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TRANSCRIPT OF RECORD

(Pages 1 to 416)

Supreme Court of the United States

OCTOBER TERM, 1954

No. 49

WILLIAM J. OPPER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1954

CERTIORARI GRANTED JUNE 7, 1954

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DISTRICT COURT OF THE UNITED STATES,

Southern District of Ohio, Western Division.

No. 2669.

(18 U. S. C., Sections 281, 2 and 371.)

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT GEORGE HOLLIFIELD, SR.,
WILLIAM J. OPPER,
Defendants.

INDICTMENT.

(Filed March 5, 1952.)

The Grand Jury charges:

Count One.

That on or about the 1st day of October, 1950, at Wright-Patterson Air Force Base, in the Southern District of Ohio, Western Division, and within the jurisdiction of this Court, the defendant, Robert George Hollifield, Sr., then an employee of the United States, to wit, a designer and Chief of the Land Survival Unit, Medical Specialties Branch, Aero Medical Laboratory, Wright Air Development Center, United States Air Force, Wright-Patterson Air Force Base, did directly agree to receive compensation from defendant, William J. Opper, for services to be rendered by Hollifield in relation to certain purchase requests in which the United States was a party and was directly interested, which purchase requests were then before the Department of the Air Force of the United States, in that at said time and place Hollifield did directly agree to receive from Opper seventeen hundred and fifty dollars

($1,750.00) as compensation for the rendition of services by Hollifield for Opper which would consist in Hollifield's recommending the approval and procurement by the Department of the Air Force of the United States of certain types of sun goggles and ski goggles, which goggles were in relation to the following purchase requests:

Purchase Request 119443 dated August 17, 1950, which resulted in Contracts AF33(038) 17438, dated November 16, 1950, and AF33(038) 18136, dated December 18, 1950; and Purchase Requests 119432, dated July 31, 1950, and 119450, dated September 14, 1950, which resulted in Contract AF33(038) 16916, dated October 30, 1950.

The United States was then directly interested in, and was a party to, each of said purchase requests and said purchase requests were then pending before the Department of the Air Force of the United States.

At Wright-Patterson Air Force Base, Ohio, and within the jurisdiction of this Court on or about the 1st day of October, 1950, the defendant, William J. Opper, did aid, abet, counsel, induce and procure the defendant, Robert George Hollifield, Sr., unlawfully to agree to receive said compensation for said services to be rendered.

(In violation of Title 18, USC, Sections 281 and 2.)

Count Two.

That on or about the 1st day of March, 1951, in or near the City of Dayton, in the Southern District of Ohio, Western Division, and within the jurisdiction of this Court, the defendant, Robert George Hollifield, Sr., then an employee of the United States, to wit, a designer and Chief of the Land Survival Unit, Medical Specialties Branch, Aero Medical Laboratory, Wright Air Development Center, United States Air Force, Wright-Patterson Air Force Base, did receive compensation directly from defendant, William J. Opper, for services rendered and to be rendered by Hollifield in relation to certain contracts and other mat

ters in which the United States was a party and was directly interested, which contracts and other matters were then before the Department of the Air Force of the United States, in that at said time and place Hollifield did receive directly from Opper fifty dollars ($50.00) in United States currency as compensation for the rendition of services by Hollifield for Opper which consisted in Hollifield's recommending the approval and procurement by the Department of the Air Force of the United States of certain types of sun goggles and ski goggles, which goggles were in relation to the following Contracts and Purchase Requests:

Contract AF33(038) 17438, dated November 16, 1950; Contract AF33(038) 18136, dated December 18, 1950; Contract AF33(038) 16916, dated October 30, 1950; Purchase Request 133766-C, dated January 6, 1951, which resulted in Contract AF33(038) 26641, dated May 31, 1951; and Purchase Requests 133709, dated December 30, 1950, and 127196, dated January 2, 1951, which resulted in Contract AF33(038) 26634, dated June 4, 1951.

The United States was then directly interested in, and was a party to, each of said Contracts and Purchase Requests and said Contracts and Purchase Requests were then pending before the Department of the Air Force of the United States.

In or near the City of Dayton, Ohio, and within the jurisdiction of this Court on or about the 1st day of March, 1951, the defendant, William J. Opper, did aid, abet, counsel, induce and procure the defendant Robert George Hollifield, Sr., unlawfully to receive said compensation for said services so rendered and to be rendered.

(In violation of Title 18, USC, Sections 281 and 2.)

Count Three.

That on or about the 1st day of March, 1951, in or near the City of Dayton, in the Southern District of Ohio, Western Division, and within the jurisdiction of this Court, the

defendant, Robert George Hollifield, Sr., then an employee of the United States, to wit, a designer and Chief of the Land Survival Unit, Medical Specialties Branch, Aero Medical Laboratory, Wright Air Development Center, United States Air Force, Wright-Patterson Air Force Base, did receive compensation directly from defendant, William J. Opper, for services rendered and to be rendered by Hollifield in relation to certain contracts and other matters in which the United States was a party and was directly interested, which contracts and other matters were then before the Department of the Air Force of the United States, in that at said time and place Hollifield did receive directly from Opper approximately two hundred and fifty dollars ($250.00) in United States currency as compensation for the rendition of services by Hollifield for Opper which consisted in Hollifield's recommending the approval and procurement by the Department of the Air Force of the United States of certain types of sun goggles and ski goggles, which goggles were in relation to the following Contracts and Purchase Requests:

Contract AF33(038) 17438, dated November 16, 1950; Contract AF33(038) 18136, dated December 18, 1950; Contract AF33(038) 16916, dated October 30, 1950; Purchase Request 133766-C, dated January 6, 1951, which resulted in Contract AF33(038) 26641, dated May 31, 1951; and Purchase Requests 133709, dated December 30, 1950, and 127196, dated January 2, 1951, which resulted in Contract AF33(038) 26634, dated June 4, 1951.

The United States was then directly interested in, and was a party to, each of said Contracts and Purchase Requests and said Contracts and Purchase Requests were then pending before the Department of the Air Force of the United States.

In or near the City of Dayton, Ohio, and within the jurisdiction of this Court on or about the 1st day of March, 1951, the defendant, William J. Opper, did aid, abet, counsel, induce and procure the defendant, Robert George

Hollifield, Sr., unlawfully to receive said compensation for said services so rendered and to be rendered.

(In violation of Title 18, USC, Sections 281 and 2.)

Count Four.

That a short time prior to the 5th day of August, 1951, in the City of Dayton, in the Southern District of Ohio, Western Division, and within the jurisdiction of this Court, the defendant, Robert George Hollifield, Sr., then an employee of the United States, to wit, a designer and Chief of the Land Survival Unit, Medical Specialties Branch, Aero Medical Laboratory, Wright Air Development Center, United States Air Force, Wright-Patterson Air Force Base, did receive compensation directly from defendant, William J. Opper, for services rendered and to be rendered by Hollifield in relation to certain contracts in which the United States was a party and was directly interested, which contracts were then before the Department of the Air Force of the United States, in that at said time and place Hollifield did receive directly from Opper approximately two hundred dollars ($200.00) in United States currency as compensation for the rendition of services by Hollifield for Opper which consisted in Hollifield's recommending the approval and procurement by the Department of the Air Force of the United States of certain types of sun goggles and ski goggles, which goggles were in relation to the following Contracts:

Contracts AF33(038) 17438, dated November 16, 1950, AF33(038) 18136, dated December 18, 1950, AF33(038) 26641, dated May 31, 1951, AF33(038) 16916, dated October 30, 1950, AF33(038) 26634, dated June 4, 1951, and AF33(038) 29989, dated June 26, 1951.

The United States was then directly interested in, and was a party to, each of said Contracts and said Contracts were then pending before the Departn ent of the Air Force of the United States.

In the City of Dayton, Ohio, and within the jurisdiction of the Court a short time prior to the 5th day of August, 1951, the defendant, William J. Opper, did aid, abet, counsel, induce and procure the defendant, Robert George Hollifield, Sr., unlawfully to receive said compensation for said services so rendered and to be rendered.

(In violation of Title 18, USC, Sections 281 and 2.)

Count Five.

That from on or about the 1st day of October, 1950, until on or about the 26th day of September, 1951, in the Southern District of Ohio, Western Division, and within the jurisdiction of this Court, and at Chicago, Illinois, the defendants, Robert George Hollifield, Sr., and William J. Opper, did conspire to commit offenses against the United States, and to defraud the United States by conspiring to violate Section 281 or Title 18, United States Code, and to defraud the United States within the meaning of Section 371 of Title 18, United States Code, in that:

(1) The defendants did conspire to cause Hollifield, then an employee of the United States, to wit, a designer and Chief of the Land Survival Unit, Medical Specialties Branch, Aero Medical Laboratory, Wright Air Development Center, United States Air Force, Wright-Patterson Air Force Base, to directly receive from Opper compensation for services rendered and to be rendered by Hollifield in relation to the contracts and purchase requests mentioned in the first four counts of this indictment, to each of which contracts and purchase requests the United States was, during the time above mentioned, a party and was directly interested, and which contracts and purchase requests were then pending before the Department of the Air Force of the United States. The defendants did further conspire that the services which Hollifield would render for the compensation paid him and to be paid him by Opper would consist in Hollifield's recommending the approval and procurement by the Department of the Air

Force of the United States of certain types of sun goggles and ski goggles which goggles were in relation to the contracts and purchase requests above mentioned.

(2) The defendants did further conspire to defraud the United States (a) of and concerning its right to have the lawful functions of the defendant, Hollifield, as an employee of the United States Air Force, performed free from unlawful impairment, obstruction, collusion, partiality, improper influence, bias, dishonesty and fraud, and (b) of and concerning its right to have Hollifield's duties performed untainted by the unlawful receipt by him of compensation from outside sources for services rendered in connection therewith.

The Grand Jury further charges that in the furtherance of this conspiracy the defendants committed the following overt acts:

Overt Act One.

On or about the 1st day of October, 1950, at Wright-Patterson Air Force Base, Ohio, a conversation was had between Hollifield and Opper concerning the sale of goggles to concern holding contracts with the United States Air Force.

Overt Act Two.

On or about the 1st day of October, 1950, at Wright-Patterson Air Force Base, Ohio, a conversation was had between Hollifield and Opper concerning the approval for use by the United States Air Force of certain surplus goggles which might be supplied by Opper to contractors with the Air Force.

Overt Act Three.

On or about the 1st day of October, 1950, at Wright-Patterson Air Force Base, Ohio, a meeting was had between Hollifield and Opper concerning the payment of money by Opper to Hollifield for Hollifield's influence in

having certain goggles approved for use by the United States Air Force.

Overt Act Four.

On or about the 22nd day of November 1950, at Wright-Patterson Air Force Base, Ohio, Hollifield caused a memorandum to be prepared and sent to United States Air Force, Air Material Command, Procurement and Industrial Planning Division, Research and Material Section, Supply Branch, Fabric and Clothing Unit, in which it was stated that certain goggles, which had been supplied by Opper, were suitable for use by the United States Air Force.

Overt Act Five.

A short time prior to the 25th day of January, 1951, at Wright-Patterson Air Force Base, Ohio, a conference was held between Hollifield, Opper and certain Officers and employees of the Visual Unit Aero Medical Laboratory, Wright Air Development Center, Wright-Patterson Air Force Base, United States Air Force, concerning the approval for use by the United States Air Force of goggles supplied by Opper.

Overt Act Six.

On or about the 25th day of January, 1951, at Wright-Patterson Air Force Base, Ohio, Hollifield did cause a memorandum to be prepared and sent to the Visual Unit, Aero Medical Laboratory, Wright-Air Development Center, Wright-Patterson Air Force Base, United States Air Force, in which it was requested that the Visual Unit reconsider its rejection of certain goggles which had been supplied by Opper.

Overt Act Seven.

On or about the 1st day of March, 1951, between Wright-Patterson Air Force Base, Ohio, and the Van Cleve Hotel, Dayton, Ohio, Hollifield received from Opper fifty dollars ($50.00) in United States currency.

Overt Act Eight.

On or about the 1st day of March, 1951, between Wright-Patterson Air Force Base, Ohio, and the Van Cleve Hotel, Dayton, Ohio, Hollifield received from Opper approximately two hundred and fifty dollars ($250.00) in United States currency.

Overt Act Nine.

On or about the 13th day of April, 1951, while at Dayton, Ohio, Hollifield had a long distance telephone conversation with Opper at Chicago, Illinois.

Overt Act Ten.

On or about the 14th day of April, 1951, at or near 230 East Ohio Street, Chicago, Illinois, Hollifield received from Opper one thousand dollars ($1,000.00) in United States currency.

Overt Act Eleven.

On or about the 1st day of May, 1951, in the wash room of the Wrigley Building Restaurant, Chicago, Illinois, Hollifield received from Opper one hundred dollars ($100.00) in United States Currency.

Overt Act Twelve.

On or about the 31st day of July, 1951, while at Dayton, Ohio, Hollifield had a long distance telephone conversation with Opper at Chicago, Illinois.

Overt Act Thirteen.

A short time prior to the 5th day of August, 1951, in the City of Dayton, Ohio, Hollifield received from Opper approximately two hundred dollars ($200.00) in United States currency.

Conclusion.

And the Grand Jury aforesaid does say that said defendants throughout the period of time and in the place, manner and form aforesaid, unlawfully did conspire to commit offenses against the United States and to defraud the United States and did do acts to effect the objects of the conspiracy.

(In violation of Title 18, USC, Sections 281 and 371.)

A True Bill.

Filed 3-5-52 by Ida Boyd, Deputy.

/S/ HARRY L. SMITH,
Foreman.

/S/ RAY J. O'DONNELL,
United States Attorney.

PLEA OF NOT GUILTY.

(Entered April 1, 1952.)

This day came the District Attorney on behalf of the United States and the defendant William J. Opper being present in Court at Cincinnati, Ohio, and being represented by counsel, upon being arraigned entered a plea of Not Guilty in manner and form as charged in the Indictment herein.

Bond heretofore given continued in force and effect.

MOTION TO DISMISS INDICTMENT.

(Filed April 28, 1952.)

Now comes the defendant, William J. Opper, and states that the several counts of the indictment filed herein, wherein he is charged with offenses, are not sufficient in law to require him to plead thereto, and moves the court to dismiss the indictment and the several counts thereof for the following reasons, to-wit:

One: That the indictment and/or the several counts thereof, above referred to, do not set forth any offense against the United States.

Two: That the indictment and the several counts thereof are so indefinite, vague and uncertain as not fully to inform the defendant of the charges made against him and are not sufficient in form or substance to be pleaded as former jeopardy in bar of another prosecution for the same offenses.

Three: That the indictment and the several counts thereof lack that degree of clarity and definiteness required by law to enable this defendant to comprehend the charges made against him and to enable him to prepare his defense thereto.

Four: That the indictment and the several counts thereof do not conform to the requirements of constitutional law.

Five: The fifth count of the indictment attempts to charge several conspiracies.

Six: Count five attempts to charge a conspiracy to violate Section 281, Title 18, U. S. C. The very nature of the substance of offenses attempted to be charged in counts one, two, three and four requires concerted action and in

such case there can be no separate charge of conspiracy to violate said Section.

Seven: The indictment and the several counts thereof are silent as to any charge of corrupt or unlawful intent on the part of this defendant, and further fails to charge scienter on the part of the defendant, William J. Opper, as to the official status of the co-defendant, Robert George Hollifield, as an employee of the United States Government.

/s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
Attorney for Defendant, William J. Opper,
605 Third National Bldg.,
Dayton, Ohio.

Dayton, Ohio, April 28th, 1952.

Received copy of this motion and notice of filing.

/s/ RAY J. O'DONNELL—J. B. R.,
United States Attorney.

ORDER OVERRULING MOTION TO DISMISS INDICTMENT.

(Filed May 7, 1952.)

This cause came on to be heard upon the motion of the defendant, William J. Opper, to dismiss the indictment; whereupon, the Court being fully informed in the matter, finds that said motion is not well taken and that the same should be and hereby is overruled as to each of the grounds set forth separately and in its entirety.

Exceptions to defendant.

/s/ NEVIN,
Judge, United States District Court.

/s/ RAY J. O'DONNELL,
United States Attorney.

/s/ FRANCIS C. CANNY,
Attorney for Defendant.

MOTION FOR SEVERANCE.

(Filed April 14, 1952.)

Comes now the defendant, William J. Opper, by his undersigned attorneys, and moves the Court to grant a severance to him in the above entitled cause.

/s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
3rd National Bank Building,
Dayton, Ohio,
CAMPBELL, LIVINGSTON, TEEPLE & DILDINE,
By /s/ JOHN M. KELLEY, JR.,
JOHN M. KELLEY, JR.,
Lincoln Bank Tower,
Fort Wayne, Indiana,
Attorneys for the Defendant,
William J. Opper.

April 14, 1952.

Received copy of this motion and memo and notice of its filing.

/s/ RAY J. O'DONNELL,
United States Attorney.

ORDER OVERRULING MOTION FOR SEVERANCE.

(Filed April 29, 1952.)

This cause came on to be heard upon the motion of the defendant William J. Opper for a severance of defendants pursuant to Rule 26, Federal Rules of Criminal Procedure, and was presented to the Court April 24, 1952, upon the briefs and arguments of Counsel; whereupon the Court being fully informed in the matter finds that said motion is not well taken and that the same should be and hereby is overruled.

Exceptions to defendant.

/s/ NEVIN,
Judge.

Approved:

/s/ LOREN G. WINDOM,
Assistant United States Attorney,
Attorney for Plaintiff.

/s/ FRANCIS C. CANNY,
Attorney for Defendant

MOTION FOR DISMISSAL OF INDICTMENT AND MOTION IN THE ALTERNATIVE FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S EVIDENCE.

(Filed May 26, 1952.)

Comes now the defendant, William J. Opper, at the close of the Government's evidence and moves the Court to dismiss the indictment in the above entitled cause as to the defendant, William J. Opper, or, in the alternative, moves the Court to enter a judgment of acquittal as to the defendant, William J. Opper, in the above entitled cause.

s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
3rd National Bank Building,
Dayton, Ohio,

CAMPBELL, LIVINGSTON, TEEPLE & DILDINE,
1525 Lincoln Bank Tower,
Fort Wayne, Indiana,

By s/ ALEXANDER M. CAMPBELL,
ALEXANDER M. CAMPBELL,
s/ JOHN M. KELLEY, JR.,
JOHN M. KELLEY, JR.,

Attorneys for the Defendant,
William J. Opper.

ORDER OVERRULING MOTION FOR DISMISSAL OF INDICTMENT AND MOTION IN THE ALTERNATIVE FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S EVIDENCE.

(Filed June 2, 1952.)

This day this cause came on to be heard on the "Motion for Dismissal of Indictment as to Defendant William J. Opper and Motion in the Alternative for a Judgment of Acquittal as to the Defendant William J. Opper," heretofore, to-wit, on May 26, 1952, filed by the defendant, William J. Opper.

Upon consideration whereof, the briefs and arguments of counsel for the respective parties, the Court is of the opinion and so finds that the "Motion for Dismissal of Indictment as to defendant, William J. Opper," is not well taken, and that it should be and it is overruled, and that the "Motion in the Alternative for a Judgment of Acquittal as to the defendant, William J. Opper," is not well taken, and that it should be and it is overruled.

The Court is of the opinion and finds, therefore, that the Motions hereinabove referred to, filed by the defendant, William J. Opper, "For Dismissal of Indictment" and "Motion in the Alternative for a Judgment of Acquittal as to the defendant, William J. Opper," are not well taken and should be overruled as to every branch thereof and in its entirety.

To all of which findings, rulings, orders and decrees of the Court defendant, William J. Opper, excepts.

/s/ NEVIN,
Chief Judge for the Southern District of Ohio.

/s/ J. VINCENT AUG,
/s/ FRANK J. RICHTER,
Attorneys for Plaintiff.

/s/ FRANCIS C. CANNY,
/s/ ALEX CAMPBELL,
Attorneys for Defendant, William J. Opper.

MOTION FOR DISMISSAL OF EACH COUNT OF THE INDICTMENT AND MOTION IN THE ALTERNATIVE FOR A JUDGMENT OF ACQUITTAL UPON EACH COUNT OF THE INDICTMENT AT THE CLOSE OF ALL THE EVIDENCE.

(Filed June 2, 1952.)

Comes now the defendant, William J. Opper, at the close of all the evidence and moves the court to dismiss each count of the Indictment as to the defendant, William J. Opper, or, in the alternative, moves the court to enter a judgment of acquittal as to the defendant, William J. Opper, as respects each count of the Indictment in the above-entitled cause.

/s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
3rd National Bank Building,
Dayton, Ohio,

CAMPBELL, LIVINGSTON, TEEPLE & DILDINE,
1525 Lincoln Bank Tower,
Fort Wayne, Indiana,

By /s/ ALEXANDER M. CAMPBELL,
ALEXANDER M. CAMPBELL,
/s/ JOHN M. KELLEY, JR.,
JOHN M. KELLEY, JR.,

Attorneys for the Defendant,
William J. Opper.

ORDER OVERRULING MOTION FOR DISMISSAL OF EACH COUNT OF THE INDICTMENT AND MOTION IN THE ALTERNATIVE FOR A JUDGMENT OF ACQUITTAL UPON EACH COUNT OF THE INDICTMENT AT THE CLOSE OF ALL THE EVIDENCE.

(Filed June 3, 1952.)

This cause coming on to be heard on the "Motion for Dismissal of Each Count of the Indictment as to Defendant, William J. Opper, and Motion in the Alternative for a Judgment of Acquittal Upon Each Count of the Indictment as to the Defendant, William J. Opper";

The Court, being fully advised in the premises, hereby finds that the Motion is not well taken, and it is hereby overruled.

To all of which defendant, William J. Opper, by his counsel, excepts.

/s/ NEVIN,
Chief Judge for the Southern District of Ohio.

/s/ J. VINCENT AUG,
/s/ FRANK J. RICHTER,
Attorneys for Plaintiff.

/s/ FRANCIS C. CANNY,
/s/ JOHN M. KELLEY, JR.,
/s/ ALEX CAMPBELL,
Attorneys for Defendant, William J. Opper.

VERDICT OF JURY.

(Filed June 5, 1952.)

We, The Jury, herein do find the defendant, William P. Opper, guilty in manner and form as charged in the 1, 2, 3, 4, and 5 counts of said indictment, and ..... guilty as charged in the remaining counts thereof.

Signed Thomas F. Anderson, Foreman.
2. William F. MacCandless,
3. Mary K. Tobin,
4. Lillian E. Lewe,
5. Otto D. Sanda,
6. Raymon Marker,
7. Rita Hussmann,
8. Carl W. Epley,
9. Marguerite Stoltz,
10. Robert J. McCarthy,
11. Helen See,
12. John E. Parker.

MOTION FOR NEW TRIAL, WITH ATTACHED AFFIDAVIT OF JUROR RAYMON J. MARKER.

(Filed June 10, 1952.)

Comes now the defendant, William J. Opper, and moves the court to set aside the verdict herein and to grant him a new trial in this cause for the reasons hereinafter set forth, to-wit:

First: That the court erred in overruling this defendant's motion for severance made before trial and renewed during the course of the presentation of the Government's evidence.

Second: That the court erred in overruling this defendant's motion for a continuance made before trial.

Third: That the court erred in overruling the motion of this defendant to dismiss the indictment herein, made before trial and renewed both at the conclusion of the Government's evidence and at the conclusion of all the evidence, for the reasons and upon the grounds stated in said motion and in the memoranda attached thereto.

Fourth: That the court erred in admitting incompetent, irrelevant, immaterial and prejudicial evidence against this defendant.

Fifth: That the court erred in unjustly limiting the cross-examination, by defendant's counsel, of the Government's witnesses Jerome Kistner, Major Robert Paulson, John W. White, Chester Buchsbaum, Mary Jane Morrisey, Robert L. Hoover, Moncure Noble, Clay W. Pardo, Francis Regan and John DeNeale.

Sixth: That the court erred in overruling the motion of this defendant to delete the name of Opper from (a) those

portions of Government Exhibits 37, 38, 39 and 40 as were received in evidence, and from (b) the testimony of Government witnesses Moncure Noble, Clay W. Pardo, Edward C. Scharrer and John DeNeale.

Seventh: That the court erred in admitting into evidence against this defendant Government Exhibits numbered 2 to 13 all inclusive; Government Exhibit No. 15; Government Exhibits numbered 17 to 51 all inclusive.

Eighth: That the court erred in overruling the motion of this defendant in the alternative for judgment of acquittal made at the close of the Government's evidence and renewed at the close of all of the evidence.

Ninth: That the court erred in overruling the motion of this defendant made at the close of the Government's evidence and renewed at the close of all the evidence to strike from the record in this cause all the evidence, written and oral, constituting statements and/or admissions made by either of the defendants on and subsequent to September 26, 1951.

Tenth: That the court erred in overruling the motion of this defendant for a continuance made during the course of the presentation of defendant's evidence.

Eleventh: That the court erred in unjustly excluding competent, relevant and material evidence offered and tendered in evidence by the defendant both in the form of testimony and in the form of written exhibits.

Twelfth: That there was not sufficient evidence to sustain the verdict or upon which the verdict of the jury may be sustained or to establish the guilt of this defendant as to any of the counts of the indictment.

Thirteenth: That the court erred in overruling this defendant's motion made at the conclusion of all the evi-

dence to strike Government's Exhibits 31 and 44 and all testimony relating thereto.

Fourteenth: That the court erred in overruling this defendant's motion, made at the conclusion of all the evidence, for an order requiring the Government to elect as between certain counts of the indictment.

Fifteenth: That the verdict of the jury was the result of bias and prejudice.

Sixteenth: That the verdict of the jury is contrary to the evidence.

Seventeenth: That the verdict of the jury is contrary to law.

Eighteenth: That the court erred in overruling the defendant's requests for instructions.

Nineteenth: That the court erred in refusing defendant's motion and request to order the jury to return to the Jury room for further deliberations. At the time said motion was made by defense counsel the jury was in the Jury Box and was being polled by the court. During the polling of the jury it developed that Juror No. 6, Mr. Raymon J. Marker, failed to indicate in response to a question from the Court that he had arrived at a verdict. Said Juror in response to the question by the court when polled said in substance "I guess." Whereupon, the defense counsel made the motion to return the jury for further deliberations on the grounds that all twelve of the Jurors had not arrived at a verdict. Said Juror has made an affidavit, which is filed herewith and marked:

EXHIBIT "A."

Twentieth: That the jury did not reach an unanimous verdict.

See Defendant's Exhibit "A."

Wherefore, this defendant prays the order of the court.

/s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
605 Third National Bank Bldg.,
Dayton, Ohio,
CAMPBELL, LIVINGSTON, TEEPLE & DILDINE,
1525 Lincoln Tower,
Fort Wayne, Indiana,
By /s/ ALEX CAMPBELL,
ALEX CAMPBELL,
By /s/ JOHN M. KELLEY, JR.,
JOHN M. KELLEY, JR.,
Attorneys for the Defendant William J. Opper.

AFFIDAVIT.

(Exhibit "A.")

State of Ohio,
Montgomery County, ss:

Raymon J. Marker, being first duly cautioned and sworn says as follows: I was a sworn juror in the above entitled cause. In the last few minutes before the jury left the Jury Room to report its verdict, I changed my vote from "Not Guilty" to "Guilty"; one other juror was also voting for acquittal up to the last half hour. It had been intimated by two of the jurors that I had some ulterior reason for my voting. Also, the Court, on the first day of the trial censored a prospective juror in severe terms for not saying earlier that he could not serve for personal reasons. I signed the verdict of "Guilty," but when I was seated in the jury box and was asked individually if it was my verdict I wanted to speak out that it was

not my conscientious verdict, but I was afraid the Court would censor me or hold me in contempt of court for changing my verdict after having signed it. My conscience bothered me afterward and I sought out Harold H. Shellenberger and told him of my situation. I give this affidavit in the interest of justice and to clear my conscience.

/s/ RAYMON J. MARKER.

Sworn to and subscribed before me by the said Raymon J. Marker, this 6th day of June, 1952.

/s/ HELEN L. KOPENS,
Notary Public, Montgomery County, Ohio.

Helen L. Kopens,
My commission expires February 14, 1954.

SUPPLEMENTAL AFFIDAVIT OF JUROR RAYMON J. MARKER.

(Filed June 16, 1952.)

State of Ohio, County of Darke: SS

Raymon J. Marker, being first duly cautioned and sworn, says that this is a supplemental affidavit to his previous affidavit dated June 6, 1952.

Supplemental Affidavit of Juror Raymon J. Marker

Affiant says that one of the jurors in the above entitled case, at a late stage in the deliberations, demanded to know of him "What's in this for you?" or words to that effect; and that upon violent protest of affiant against this remark another juror said "If the shoe fits wear it", or words to that effect.

Affiant says that he felt that he was under strong suspicion of corrupt motives in voting for acquittal; that several of his fellow jurors were extremely critical of his position.

Affiant says that the verdicts he signed were not his true verdicts and that he signed said verdicts under pressure.

Further affiant saith not.

/s/ RAYMON J. MARKER.

Sworn to before me and subscribed in my presence, by the said Raymon J. Marker, this 14th day of June, A. D. 1952.

/s/ HAROLD L. SHELLENBERGER.

Harold L. Shellenberger, Notary Public in and for State of Ohio at Large.

My Commission Expires: 4-21-1955.

(Seal)

ORDER OVERRULING MOTION FOR NEW TRIAL.

(Filed June 20, 1952.)

On June 16, 1952, this cause came on to be heard on the motion for new trial theretofore, to-wit, on June 10, 1952, filed by defendant herein, William J. Opper.

Upon consideration whereof, the Court, having heard the arguments of counsel and being fully advised in the premises, found, and does find, that the motion for new trial hereinabove referred to, filed on June 10, 1952, is not well taken as to each and every reason and paragraph set forth therein.

It was, and is, therefore, by the Court ordered on June 16, 1952, that the motion for new trial above referred to, filed by defendant William J. Opper, be, and hereby it is, overruled as to each and every reason and paragraph thereof and in its entirety.

To all of which findings, rulings and decrees of the Court, defendant Opper excepts.

/s/ ROBERT R. NEVIN,
Chief Judge, U. S. District
Court, S. D. O.

ORDER STRIKING AFFIDAVIT AND SUPPLEMENTAL AFFIDAVIT OF JUROR RAYMON J. MARKER FROM RECORD.

(Filed June 20, 1952.)

On June 10, 1952, defendant herein, Opper, filed a motion for a new trial, to which he attached, as Exhibit A, an affidavit purporting to have been signed by one Ramon J. Marker, a juror who sat in the trial of the case.

Upon a consideration of the motion for a new trial and the affidavit attached thereto, the Court, on June 16, 1952, found that the affidavit was not only wholly irrelevant and immaterial, but highly impertinent, and the Court, of its own motion, therefore, on June 16, 1952, ordered the affidavit stricken from the record.

And it further appearing that on June 16, 1952, a document entitled "Supplemental Affidavit" also purporting to have been signed by one Ramon J. Marker, was filed by defendant Opper, the Court on June 16, 1952, for the reasons above stated with regard to the affidavit marked Exhibit A, attached to the motion for a new trial by defendant Opper, of its own motion, ordered the so-called "Supplemental Affidavit" stricken from the record.

To all of which findings, rulings, orders and decrees of the court defendant Opper excepts.

/s/ ROBERT R. NEVIN,
Chief Judge, U. S. District
Court, S. D. O.

JUDGMENT AND COMMITMENT.

(Filed June 16, 1952.)

On this 16th day of June, 1952, came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not Guilty and a Verdict of guilty of the offense of Employee of U. S. receiving compensation in matter affecting Government, and aiding, inducing, etc., commission of said act in violation of Sec. 281, T. 18, USC, and Sec. 2, T. 18, USC; Conspiracy to violate Sec. 281, T. 18, USC, and to defraud the United States in violation of Sec. 371, T. 18, USC, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two years on count 1; and One year on count 4. The sentence on count 4 to run consecutively with the sentence on count 1. Pay a fine of $500.00 on count 2 and stand committed until the fine is paid or otherwise discharged by law. Pay a fine of $500.00 on count 3 and stand committed until the fine is paid or otherwise discharged by law. Remanded to the custody of the Attorney General for a period of one year and one day on count 5. The sentence on count 5 to run concurrently with the sentences on counts 1 and 4.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ROBERT R. NEVIN,
United States District Judge.

Approved:

/s/ RAY J. O'DONNELL,
U. S. Attorney.

MOTION TO ARREST JUDGMENT.

(Filed June 10, 1952.)

Now comes the defendant, William J. Opper, by his attorneys, and moves the court to arrest judgment because none of the counts in the Indictment charges an offense against the United States.

/s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
605 Third National Bank Bldg.,
Dayton, Ohio,

CAMPBELL, LIVINGSTON, TEEPLE & DILDINE,
1525 Lincoln Tower,
Fort Wayne, Indiana,

By /s/ ALEX CAMPBELL,
ALEX CAMPBELL,
By /s/ JOHN M. KELLEY, JR.,
JOHN M. KELLEY, JR.,
Attorneys for Defendant
William J. Opper.

June 10, 1952.

Received copy of the above motion and Notice of Rehearing thereon.

/s/ RAY J. O'DONNELL,
United States Attorney, S. D. O.

ORDER OVERRULING MOTION TO ARREST JUDGMENT.

(Filed June 20, 1952.)

On June 16, 1952, this cause came on for hearing on the "motion to arrest judgment" theretofore, to-wit, on June 10, 1952, filed by defendant William J. Opper.

Upon consideration whereof, the Court was, and is, of the opinion that the motion to arrest judgment just referred to was not, and is not, well taken and that it should be overruled.

It Is, Therefore, by the Court Ordered, Adjudged and Decreed that the motion to arrest judgment filed by defendant Opper on June 10, 1952, be, and hereby it is, as of June 16, 1952, overruled.

To all of which findings, rulings and decrees of the Court defendant Opper excepts.

/s/ ROBERT R. NEVIN
Chief Judge,
U. S. District Court, S. D. O.

NOTICE OF APPEAL.

(Filed June 17, 1952.)

Item I: The Title of This Case:

United States of America

v.

Robert George Hollifield, Sr.
William J. Opper

Case No. 2669 Criminal

United States District Court
Southern District of Ohio
Western Division

Item II: Names and Addresses of Appellant and His Counsel:

Appellant: William J. Opper, 230 Ohio Avenue, Chicago, Illinois.

Counsel for Appellant: Francis C. Canny, 605 Third National Bldg., Dayton, Ohio; Campbell, Livingston, Teeple & Dildine, 1525 Lincoln Tower, Fort Wayne, Indiana, By: Alexander Campbell, By: John M. Kelley, Jr.

Item III: General Statement of the Offense:

Appellant was found guilty on all five (5) counts of the indictment.

The first count of the indictment charged appellant under Section 2, Title 18, USC, with aiding and abetting Hollifield in violating Section 281, Title 18 of the United States Code, by his (Hollifield's) agreeing to receive compensation for services to be rendered for appellant in connection with purchase requests and contracts to which the United States was a party, he, Hollifield, being an employee of the United States.

The second count charged appellant under Section 2, Title 18, of the United States Code, with aiding and abet-

ting Hollifield, a government employee, to violate Section 281, of the United States Code, in that he (Hollifield) received the sum of Fifty ($50.00) Dollars from appellant for services in connection with contracts to which the United States was a party.

The third count charged appellant under Section 2, Title 18, of the United States Code, with aiding and abetting Hollifield, a government employee, to violate Section 281, of the United States Code, in that he (Hollifield) received the sum of Two Hundred Fifty ($250.00) Dollars from appellant for services in connection with contracts to which the United States was a party.

The fourth count charged appellant under Section 2, Title 18, of the United States Code, with aiding and abetting Hollifield, a government employee, to violate Section 281, of the United States Code, in that he (Hollifield) received the sum of Two Hundred ($200.00) Dollars from appellant for services in connection with contracts to which the United States was a party.

Appellant was also found guilty in count five (5) of the indictment charging appellant with conspiracy with his co-defendant, Robert George Hollifield, Sr. (United States employee involved), to defraud the United States to commit offenses against the United States and to defraud the United States by conspiring to violate Section 281 of Title 18 of the United States Code, and to defraud the United States within meaning of Section 371, Title 18 of the United States Code, by means of giving and receiving compensation in connection with purchase orders and contracts in which the United States was a party and directly interested by reason of which payments the defendant, Hollifield, was induced to favor the appellant.

Item IV: Statement of Judgment and Sentence:

The court entered judgment on the verdict of guilty (which had been returned June 5, 1952) on June 16, 1952, and imposed upon appellant the following sentence:

Two years on Count One.

Fine of Five Hundred ($500.00) Dollars on Count Two.

Fine of Five Hundred ($500.00) Dollars on Count Three.

One year on Count Four to run consecutively with Count One.

One year and a day on Count Five to run concurrently with Counts One and Four.

Item V: Place of Confinement:

Appellant, William J. Opper, is presently confined in the County Jail, Miami County, Troy, Ohio.

Item VI: The appellant, William J. Opper, appeals from the judgment of the court entered June 16, 1952, to the United States Court of Appeals, Sixth Circuit.

Dated: June 17, 1952.

/s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
605 Third National Bldg.,
Dayton, Ohio,
CAMPBELL, LIVINGSTON, TEEPLE & DILDINE,
1525 Lincoln Tower,
Fort Wayne, Indiana,
By /s/ ALEXANDER CAMPBELL,
ALEXANDER CAMPBELL,
By /s/ JOHN M. KELLEY, JR.,
JOHN M. KELLEY, JR.,
Attorneys for Appellant, William J. Opper.

Copy of Notice of Appeal, Appellant, William J. Opper, received 6/17/52 day of June, 1952, Dayton, Ohio.

/s/ R. J. O'DONNELL,
United States Attorney.

MOTION TO EXTEND TIME FOR FILING RECORD ON APPEAL.

(Filed July 25, 1952.)

Now come the defendants, Robert George Hollifield, Sr., and William J. Opper, and move the Court to extend the time for filing and docketing the record on appeal herein until the 25th day of September, 1952.

Notice of appeal was filed in the District Court on the 16th day of June, 1952, and counsel for defendants were advised by the official court stenographer of the District Court that it is impossible for her to have the transcription of the record complete before the 25th day of August, 1952, and thereafter the record must be printed.

Wherefore, the defendants pray that the Court will enter an order extending the time for filing and docketing the record until September 25, 1952.

/s/ FRANK J. SVOBODA, JR.,
FRANK J. SVOBODA, JR.,
1040 Third National Bldg.,
Dayton, Ohio,
Attorney for Defendant,
Robert George Hollifield, Sr.

/s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
Attorney for Defendant,
William J. Opper
605 Third National Bldg.,
Dayton, Ohio.

Received a copy of the above motion and notice this 26th day of July, 1952.

/s/ RAY J. O'DONNELL,
United States Attorney.

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL.

(Filed July 25, 1952.)

This cause came on for hearing on the motion of Robert George Hollifield, Sr., and William J. Opper, defendants, to extend time for filing the record on appeal to the Court of Appeals for the Sixth Circuit, and good cause appearing for such extension, it is

Ordered that the time for filing the record on Appeal, and docketing the appeal herein be and the same hereby is extended to and including the 25th day of September, 1952.

/s/ ROBERT R. NEVIN,
Judge.

/s/ RAY J. O'DONNELL,
United States Attorney.

/s/ FRANK J. SVOBODA, JR.,
FRANK J. SVOBODA, JR.,
Attorney for defendant,
Robert George Hollifield, Sr.,
1040 Third National Bldg.,
Dayton, Ohio.

/s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
Attorney for defendant,
William J. Opper,
605 Third National Bldg.,
Dayton, Ohio.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

(Filed August 18, 1952.)

Appellant, William J. Opper, by his counsel, states that the points on which he intends to rely on his appeal are as follows:

1. The District Court erred in overruling Appellant's motion to dismiss the indictment made before trial and renewed at the conclusion of the Government's evidence and at the conclusion of all the evidence.

2. The District Court erred in overruling Appellant's motion for judgment of acquittal made at the close of the Government's evidence and renewed at the close of all the evidence.

3. There was not sufficient evidence to sustain the verdict or upon which the verdict of the jury may be sustained or to establish the guilt of Appellant upon any of the counts of the indictment.

4. The verdict of the jury is contrary to the evidence.

5. The verdict of the jury is contrary to law.

6. The jury did not reach an unanimous verdict.

7. The District Court erred in denying Appellant's motion and request to order the jury to return to the jury room for further deliberations.

8. The District Court erred in denying Appellant's motion that the Court conduct an investigation for the purpose of interrogating all of the jurors concerning the occurrences set forth in the affidavit and supplemental affidavit of juror Raymond J. Marker.

9. The District Court erred in striking from the record the affidavit and supplemental affidavit of juror Raymond J. Marker.

10. The District Court erred in overruling Appellant's motion for a new trial.

11. The District Court erred in overruling Appellant's motion to arrest judgment.

/s/ FRANCIS C. CANNY,
FRANCIS C. CANNY,
605 Third National Bank,
Dayton, Ohio,
CAMPBELL, LIVINGSTON, TEEPLE & DILDINE,
1525 Lincoln Tower,
Fort Wayne, Indiana,
By: /s/ JOHN M. KELLEY, JR.,
By: /s/ ALEX CAMPBELL,
Attorneys for Appellant.

Receipt of a copy and notice of filing of the foregoing statement of points on which Appellant William J. Opper intends to rely on appeal is hereby acknowledged this 12th day of August, 1952.

/s/ FRANK J. RICHTER,
Asst. United States Attorney.

MOTION TO SEND ORIGINAL EXHIBITS TO COURT OF APPEALS IN LIEU OF COPIES.

(Filed September 4, 1952.)

Now comes the defendant (Appellant) William J. Opper, by his undersigned attorneys, and moves the Court for an order providing that the original exhibits hereinafter designated, be transmitted to the Court of Appeals in lieu of

copies thereof in accordance with Rule 75 (i), Federal Rules of Civil and Criminal Procedure, the exhibits aforesaid being as follows: Government Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28-a, 28-b, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 and 51; and defendant (Appellant) Exhibits Nos. a, a-1, a-2, b, c, d, d-1, g, u, v, cc, and ee.

The instant motion is made for the reason that the exhibits aforesaid are bulky and voluminous in nature, consisting in large part of Government contracts, the copying of which would entail great time and expense, and that the ends of justice would be fully served for the purposes of this appeal if said exhibits were before the Court of Appeals in their original form.

CAMPBELL, LIVINGSTON, TEEPLE & DILDINE,
1525 Lincoln Bank Tower,
Fort Wayne, Indiana,

By: /s/ ALEXANDER CAMPBELL,
ALEXANDER CAMPBELL,

By: /s/ JOHN M. KELLEY, JR.,
JOHN M. KELLEY, JR.,

Attorneys for the Appellant
William J. Opper.

Service of a copy of the foregoing motion and notice of filing is hereby acknowledged this 3 day of September, 1952.

/s/ J. VINCENT AUG,
Asst. United States Attorney.

ORDER TO SEND ORIGINAL EXHIBITS TO COURT OF APPEALS IN LIEU OF COPIES.

(Filed September 4, 1952.)

On motion of Appellant, William J. Opper,

It is ordered that the Clerk of this Court transmit to the Clerk of the United States Court of Appeals, for the Sixth Circuit, with and as a part of the record on appeal in said cause, and in lieu of copies thereof, the following original exhibits in said cause: Government Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28-a, 28-b, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 and 51; and defendant (Appellant) Exhibits Nos. a, a-1, a-2, b, c, d, d-1, g, u, v, cc and ee.

Dated September 4, 1952.

/s/ ROBERT R. NEVIN,
Chief Judge, for the Southern
District of Ohio.

Have Seen—

RAY J. O'DONNELL,
J. VINCENT AUG,
For Plaintiff,
United States of America.

JOHN M. KELLEY, JR.,
Attorney for William J. Opper,
Defendant-Appellant.

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL.

(Filed September 10, 1952.)

It is hereby stipulated by and between the attorneys for the appellant, William J. Opper, and the attorneys for the appellee, United States of America, that the following shall constitute the transcript of record on appeal herein from the above-named court to the United States Court of Appeals for the Sixth Circuit, in the above-entitled cause:

1. Indictment.

2. Plea of not guilty.

3. Motion to dismiss the indictment.

4. Order overruling motion to dismiss the indictment.

5. Motion for severance.

6. Order overruling motion for severance.

7. Motion for dismissal of indictment and motion in the alternative for a judgment of acquittal filed at the close of the Government's evidence.

8. Order overruling motion for dismissal of indictment and motion in the alternative for a judgment of acquittal filed at the close of the Government's evidence.

9. Motion for dismissal of indictment and motion in the alternative for a judgment of acquittal filed at the close of all the evidence.

10. Order overruling motion for dismissal of indictment and motion in the alternative for a judgment of acquittal filed at the close of all the evidence.

11. Verdict of the jury.

12. Motion for a new trial with attached affidavit of juror Raymon J. Marker.

13. Supplemental affidavit of juror Raymon J. Marker.

14. Order overruling motion for a new trial.

15. Order striking affidavit and supplemental affidavit of juror Raymon J. Marker from the record.

16. Judgment and commitment.

17. Motion to arrest judgment.

18. Order overruling motion to arrest judgment.

19. Notice of appeal.

20. Motion to extend time for filing record on appeal.

21. Order extending time for filing record on appeal.

22. Statement of points upon which appellant intends to rely on appeal.

23. Motion to send original exhibits to United States Court of Appeals in lieu of copies.

24. Order to send original exhibits to United States Court of Appeals in lieu of copies.

25. Stipulation as to contents of record on appeal.

26. Complete transcript of trial proceedings omitting opening statements and closing arguments of counsel and including colloquy between the Court and prospective jurors Smith and Biddel of May 7, 1952, the Court's charge to the jury and the proceedings of June 5, 1952 and June 16, 1952.

27. Government Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28-a, 28-b, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 and 51.

28. Defendant's (appellant's) Exhibits Nos. a, a-1, a-2 b, c, d, d-1, g, u, v, cc and ee.

Dated September 8th, 1952.

CAMPBELL, LIVINGSTON, TEEPLE & DILDINE,
1525 Lincoln Tower,
Fort Wayne, Indiana,
By: /s/ ALEX CAMPBELL,
By: /s/ JOHN M. KELLEY, JR.,
Attorneys for Appellant
William J. Opper.

/s/ J. VINCENT AUG,
Assistant United States Attorney,
Southern District of Ohio,
Western Division,
For Appellee.

TRANSCRIPT OF TRIAL PROCEEDINGS.

In the
DISTRICT COURT OF THE UNITED STATES
For the Southern District of Ohio,
Western Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT GEORGE HOLLIFIELD, SR., WILLIAM J. OPPER,
Defendants.

Case No. 2669,
Criminal.

Before Honorable Robert R. Nevin, Chief Judge, and a Jury Comprised of Twelve Regular Jurors and Two Alternate Jurors, at Dayton, Ohio, Commencing May 7, 1952.

Present:

For the Government:

Hon. Frank Richter,
Hon. Vincent J. Aug,
Assistants to the U. S. Attorney.

Hon. James E. Ruffin,
Washington, D. C.

For the Defendant Hollifield:

Arthur W. Meyring, Esq.,
Frank J. Svoboda, Jr., Esq.

For the Defendant Opper:

Francis C. Canny, Esq.,
Alex. Campbell, Esq.,
John M. Kelley, Jr., Esq.

Afternoon Session.

Wednesday, May 7, 1952.

Court met pursuant to adjournment. Counsel being present as heretofore noted, the trial of this case proceeded as follows:

The Court: Are counsel ready to proceed in the case of United States vs. Hollifield and Opper, No. 2669?

Mr. Aug: The government is ready, your Honor.

The Court: And the defendants?

Mr. Canny: Defendant Opper is ready.

Mr. Meyring: Defendant Hollifield is ready, your Honor.

The Court: The clerk will call the jurors and as your names are called, Ladies and Gentlemen, come forward, if you please, and take a seat in the jury box.

Thereupon the jurors were examined on their voir dire by counsel upon both sides, during which the following took place:

• • • • • • •

Mr. Aug: Mr. Smith from Rossburg?

Mr. Smith: Right.

Mr. Aug: How long have you lived there?

Mr. Smith: Lifetime.

Mr. Aug: Wha' do you do?

Mr. Smith: Foreman and general manager of Smith Chevrolet.

Mr. Aug: You have an automobile agency?

Mr. Smith: And a repair service.

Mr. Aug: You have a financial interest?

Mr. Smith: Yes.

Mr. Aug: Know of any reason why you couldn't render a fair and impartial verdict?

Mr. Smith: May I ask a question? I didn't get an opportunity to say anything before I was selected up here. For business reasons it would make it almost impossible for me to be here.

The Court: Why didn't you say that this morning? That is what I asked. You are excused. I don't want anybody sitting around like that. I told you all this morning. You said you would serve and I told the clerks to inquire and they said they asked everybody. We don't want to take our time fooling around with people who act like that. You are excused. Take him off of the jury entirely. I get so provoked at these people. We give them every opportunity in the world. Instead of taking it, they take up our time here to try and qualify them. Take him off the jury.

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Mr. Aug: We will excuse Mr. Biddel, if the Court please.

Mr. Biddel (Prospective Juror No. 6): May I ask one question, Judge? I work on the race tracks. Never bet on a horse in my life and the government accepts our money for taxes—

The Court: You can make your speech out in the hall. Don't take up our time in here. Call the next juror.

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The Court: Now, the balance of you who have not been called or excused, you return, if you please, tomorrow morning at 11 o'clock.

Now, you Ladies and Gentlemen who are in the jury box, of course, you have not been selected as jurors yet, but you made the first step in that direction. At least, you are sitting in the jury box. Of course, you don't know anything about this case and I wish that you would not discuss it among yourselves. I am not going to tell you

not to read the newspapers, because the minute I told you not to, why then somebody will begin to wonder what is in there and that is the first thing you want to do. So, I am not going to put a prohibition like that on you, but on the other hand you must not be prejudiced by anything you have read in the newspapers or anything that you may read in the newspapers, either now or at any time during the progress of this trial. This case must be decided on the evidence that you will hear from the witnesses and the law as I shall charge it to you, as I understand it to apply to this case. Outside of that there is nothing must interfere.

So, just be a little careful from now on, because you might be chosen and I wouldn't want anything to happen between now and tomorrow that would disqualify you. I know counsel don't either, because it is quite difficult to get a jury together.

I always adjourn at 4 o'clock and it is practically that time now. Adjourn court until tomorrow morning at 11 o'clock.

Morning Session.

Thursday, May 8, 1952.

Court met pursuant to adjournment. Counsel being present as heretofore noted, the trial of this case proceeded as follows:

The Court: Are we about to call a juror?

Mr. Canny: Yes, your Honor.

The Court: Call the next juror, please.

Thereupon counsel upon both sides proceeded to examine the jurors on their voir dire.

The Court: Now, Ladies and Gentlemen, who are in the jury box including the two alternates here, I want to speak to you just a moment or two before you are sworn. You have been asked all the questions by counsel on both

sides and they are satisfied to have the jury as it stands now and, of course, I am satisfied. However, I want to tell you one or two things, so you will understand about them before we start in. They have nothing to do with your qualifications as such under the law. I don't know how long this case will take. Even counsel could only give us an estimate, I presume. It may take several days and it may not, but we must assume, perhaps it will.

Now, if any of you are not in good health, or if any of you have any sickness at home, or if you Gentlemen have any business at your office or wherever it is you may be employed that you think would prevent you from giving to this case your undivided attention, I wish you would let us know that now. Of course, that is what I tried to say to that Gentleman yesterday. I perhaps should not have been quite so quick about it, but I thought he should have told us in advance without waiting until counsel asked him all the questions and then tell us he couldn't sit on account of his business. But even so, now that you are chosen, I don't want to impose on anybody and neither do counsel. They want you and the Court wants you to give your undivided attention to this case, while the court is here in session in your hearing.

Now, if there are any of you ladies that have children that you think may require you to be home at a certain time, as important as this case is, none of it is quite as important as the children. I don't want you to be worried here, look at the clock and think, "I should have been home thirty minutes ago to take care of the children." That is not what we want you to do. We want your mind to be clear, free and unencumbered while you are here.

Our hours will be from 11 o'clock every morning except days that I may tell you, but now the court day will be, from Monday until Friday, from 11 to 1 in the morning and then we will recess for the noon adjournment and then we will run from 2 until 4. Those hours I am respon-

sible for, because I haven't been too well the last few years and I have had to take it a little bit slower. So we will put in the four hours without recess, unless an emergency calls for it, every day except such days or times as I might designate.

Now, before you are sworn, please think these matters over very carefully, because just the minute that you are sworn the whole thing in the eyes of the law has been changed, a whole new status arises in the eyes of the law the minute you are sworn as jurors. I can't go into that. Counsel know what I am talking about. It is not material, but that is the fact: Once you are sworn we get into another phase of the case, another phase of the law. So, I want to give you, in all fairness to you and to each of you an opportunity now to be excused, if you would like, before you are sworn. * * * Now, having heard all of that and understanding that you all otherwise qualify, stand up and say so.

Thereupon some of the prospective jurors asked to be excused and counsel upon both sides proceeded to examine other prospective jurors until the panel was filled, after which the jury was sworn.

The Court: Now, Members of the Jury, you have all been chosen to sit as jurors in this case. You will find that you have a very important function to perform as we go along.

I will tell you this now but you must remember this throughout the entire case. I will probably make reference to it each time we adjourn or recess, but if I do not, you understand it carries all through the case: Do not discuss this case with anyone; do not permit anyone to talk to you about this case while it is in progress. If anyone should attempt to talk to you about this case while it is on trial, report that back to the Court immediately. Do not make up your minds in the case until you have heard all of the evidence, both on behalf of the plaintiff and on behalf of the defendants, until you

have heard the arguments of counsel and finally the law as the Court will charge you, as it applies to this case, as I understand it to be. Keep your minds free and open; listen to all that is submitted to you from the witness stand.

Now I am about to adjourn, to recess the further hearing of this cause. As I understand, it is agreeable to counsel on both sides that we adjourn now, having secured our jury, until 2 o'clock on Monday afternoon. Is that satisfactory to the government?

Mr. Canny: If your Honor please, does your Honor have some reason not to take up on Monday morning?

The Court: Yes, I have.

Mr. Canny: Then it is agreeable.

The Court: Some of the other matters here before the Court, I think it will give counsel from out of town, if they agree to do so, an opportunity to come on Monday, especially these gentlemen from Cincinnati and possibly these other gentlemen, too, without having to come on Sunday, as much as we would like to have them in Dayton. We will adjourn the further hearing of the case in a moment until 2 o'clock Monday afternoon. That will be the 12th day of May.

Now, all of the other Ladies and Gentlemen who are in the room as prospective jurors, please remain seated, but you Members of the Jury may now be excused and return, if you please, on next Monday afternoon.

Thereupon the jury retired from the court room and after the court had excused the prospective jurors who were not needed to fill the panel in this case, court was adjourned until Monday, May 12, 1952, at 11 o'clock a. m., this case being adjourned until 2 o'clock p. m. Monday, May 12, 1952.

Proceedings

Afternoon Session.

Monday, May 12, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the proceedings in the trial of this cause were resumed.

The Court: I think we have reached the stage, Gentlemen, where we are ready to have the opening statements of counsel. The government may state its case.

Mr. Aug: Very well, your Honor.

The Court: Gentlemen, I am not sure exactly what our record shows. At an earlier stage, quite an early stage the two defendants each entered a plea of not guilty, Mr. Hollifield here in Dayton, as I recall, Mr. Opper came to Cincinnati while I was holding court there and entered his plea there. But in the meantime there have been some motions and other things filed and I am not exactly sure what the record—if the record is clear about it. So I think to save any question, it would be just as well if we have the defendants, now before we make the opening statements, enter their plea and then we will know exactly where we stand.

Mr. Canny: On behalf of the defendant Opper we enter a plea of not guilty to all the counts of the indictment.

The Court: All right.

Mr. Svoboda: On behalf of the defendant Hollifield we enter a plea of not guilty to all counts.

The Court: That makes up the issue. There can't be any question. Very well. Now counsel may proceed.

* * * * * * *

The Court: Now, Members of the Jury, we are about to recess the further hearing of this cause until tomorrow morning at 11 o'clock.

During this time you will bear in mind the admonition I gave you the other day; do not talk about the case to

anyone: do not permit anyone to talk to you about it. If anyone even attempts to talk to you about this case while it is in progress you must report that fact to the Court. Do not make up your minds until you have heard all the evidence and the arguments of counsel and the charge of the Court, and until the case is finally submitted to you for your consideration and determination.

Will counsel please remain just a moment about another matter?

The jury may be excused and return, if you please, at 11 o'clock tomorrow morning.

Thereupon the jury retired from the court room and the following proceedings were had out of the hearing and presence of the jury:

The Court: Gentlemen, I asked counsel to remain just a moment for this reason: Rule 30 provides, as you Gentlemen are well aware, that at the close of the evidence, or at any earlier time during the trial as the Court reasonably directs, any party may file written requests to instruct the jury on the law as set forth in the requests.

Now, I don't know, of course, that either side, or any of you Gentlemen, either the defendants or government, have any special requests. I am asking you now in plenty of time. I do not mean I want them tomorrow or the next day, but within a reasonable time I would appreciate it if you have any, so I can go over them myself, and the other side—you can exchange them, if you will, and the other side can go over them and if you have any objection, of course, I will hear you.

There are some things, Gentlemen,—you are perfectly welcome to submit your special charges, if you wish. I do not mean to deprive you of the right, but sometimes I get requests to charge that a man is presumed to be innocent until he is proven guilty. Well, I learned that among the first things when I started in law school, many years ago. And the question about reasonable doubt, of course, I always charge reasonable doubt. In fact, I cite the Ohio

statute on that subject, which I think is about as complete a definition as you can get. Even so, you may give them to me if you wish. I can't deprive you of it. But on the other hand, it takes up your time and mine about many things of that kind that I think are unnecessary.

Now, there may be some other matters that you feel that the Court might overlook and possibly I might, which you would like to call my attention to. I would be very glad to have your advice and help in that case.

Now, I don't know what the rule is in other districts but for the benefit particularly of these Gentlemen from out of the city, from out of our district anyhow, as the other lawyers here know, it is my practice always, I do not give special charges as such. Any charge that you submit to me, if it is all agreed to, I mean if there is no objection or if I overrule the objection on either side, I will put that in my general charge, you understand. Of course, you will be perfectly free to say to the jury that the Court will charge you thus and so. I know the practice used to be years ago in our state court, we used to get up and use our special charges as our text for the argument, if we didn't have anything else to talk about, flash this paper before the jury and try to scare them to death with our special charges. I don't do that here.

I will incorporate anything that you give me that is not objected to or that—even if it is objected to and I overrule it, then I incorporate all that in my general charge as you will see.

There is no rush. I am not hurrying you. You can keep it in mind as you go along. This will give you a little opportunity to think about it.

We will adjourn court then until 11 o'clock tomorrow morning.

Thereupon the further proceedings in the trial of this cause were adjourned until tomorrow morning at 11 o'clock.

Proceedings

Morning Session.

Tuesday, May 13, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this case proceeded as follows:

(Out of the hearing of the jury):

Mr. Canny: Both the defendants would like to have an understanding that an objection during the course of the trial, entered by one of the defendants, will inure to the benefit of both.

The Court: Oh, sure, certainly. That is agreeable to the government?

Mr. Aug: Yes.

(In the hearing of the jury):

The Court: Gentlemen, I don't know that you care at all for a separation of witnesses.

Mr. Canny: That is what we are discussing now with opposite counsel.

The Court: If you do, I would rather start the rule now rather than halfway through the case.

Mr. Canny: We are discussing that phase of it now.

The Court: Of course, the defendants themselves will be in court, will be required to be, and somebody, whoever it may be, I don't care who it is, somebody can stay in representing the government in addition to the District Attorney's office, somebody that will be of some help to you with your papers and gather the things in shape for the trial. Outside of that, if you want a separation, I will order it.

Mr. Aug: I think counsel agreed on both sides, if the Court please, that we should have a separation of wit-

nesses. I think the government is entitled to have Mr. DeNeale, a representative of the F. B. I., at its table and, of course, the defense will have the two defendants and the stenographer.

The Court: Oh, certainly. Now, everybody in the court room who expects to be or if you think you might be called as a witness, whether you are subpoenaed or not, if you are going to be a witness in this case, please retire to the witness room. Do not come back in here and do not go around the hall and come up close to the door or anything of that kind. I want you to keep away entirely from the doors until you are called as a witness. Counsel will have to tell me about the rest of the people. Of course, I haven't the faintest idea who is going to be a witness and who is not.

Mr. Kelley: I am here on behalf of the defendant Opper. As to every person who we know or have reason to believe will be a witness for the defense, we will issue the same instructions to them, if the government will do the same.

Mr. Svoboda: The same for Mr. Hollifield.

Mr. Aug: We will do the same. I see no government's witnesses in the court room at the present time.

The Court: Very well. Counsel may proceed.

Mr. Aug: Call Mr. Kistner.

And thereupon

JEROME KISTNER, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. What is your name?
A. Jerome Kistner.

The Court: How do you spell your last name?

The Witness: K-i-s-t-n-e-r (spells).

Q. What is your first name?

A. Jerome.

Q. Jerome Kistner. Where do you live?

A. Wilmington, Ohio.

Q. What is your present employment, Mr. Kistner?

A. I am the Acting Chief of the Contract Distribution and File Section.

Q. How long have you been in that capacity?

A. I have been in that capacity for about three months as acting chief. Normally I am civilian chief under a military head of that particular section. I have been there for about two or two and a half years.

Q. This employment is where?

A. At Wright Field.

Q. Now can you describe briefly your duties?

A. My duties, I have two functions, one to make distribution of the official signed copies of contracts and, two, to maintain the contract files, the official files of those contracts.

Q. You are the custodian of the files?

A. Yes, sir.

Q. Now, in such capacity did you have in your possession a purchase request No. 119,443?

A. 119,443, yes, sir.

Q. Did you have in your possession purchase request 119,432?

A. 119,432, yes, sir.

Q. Did you have in your possession purchase request 133,766-C?

A. 113,766-C, yes, sir.

Q. Purchase request 133,709?

A. I have 133,709-C.

Q. You had that in your possession?

A. Yes, sir.

Q. You have purchase request 127,196?

A. I have 127,196-C.

Q. You had that in your possession?

A. I did.

Q. Did you have in your possession the files relating to contract 17438?

A. I believe you should include the station code number.

Q. Very well. Did you have in your possession contract AF33(030) 17438?

A. I did.

Q. Did you have in your possession contract AF33(038) 18136?

A. I did.

Q. Did you have in your possession contract No. AF33(038) 16916?

A. I did.

Q. Did you have in your possession contract AF33(038) 26634?

A. Yes, sir.

Q. Did you have in your possession contract AF33(038) 26641?

A. Yes, sir.

Q. Did you have in your possession contract AF33(038) 29089?

A. I did.

Q. All of those purchase requests and contracts to which we have just referred, do you now have them in your possession?

A. No, sir.

Q. When did you part with the possession of those documents?

A. On April 30, 1952.

Q. Will you tell the jury the circumstances under which you gave up the custody of those documents?

A. Mr. John J. DeNeale, of the Federal Bureau of Investigation, requested those documents from me and I turned them over to him.

Q. Do you have a receipt?

A. I do. (Produces)

Q. Will you identify that paper which I have just handed you?

Mr. Kelley: Has it been numbered?

Mr. Aug: No.

A. This piece of paper is a signed receipt of Mr. John B. DeNeale.

The Court: Do you want to offer it in evidence?

Mr. Aug: Will the stenographer mark this as Government's Exhibit No. 1 for identification?

Thereupon said receipt was marked for identification as Government's Exhibit No. 1.

Mr. Aug: We will offer it in evidence.

Mr. Kelley: May I inquire as—

The Court: It is a receipt. Yes, you may inquire, of course.

By Mr. Kelley:

Q. Mr. Kistner, on direct examination, your attention was directed to some five purchase requests by number and to six contracts by number. You stated that you had those in your possession and had relinquished possession to Special Agent J. B. DeNeale. That is Mr. DeNeale who is here at this table. This receipt that has been offered in evidence lists other documents than those to which your attention was directed, does it not?

A. It does.

Q. What are the documents listed there that have not yet been referred to?

A. Those are other contract files, purchase requests, one invitation for bid, which I turned over to Mr. DeNeale.

Q. What are the items in the column to the far right that you identified?

A. The number of folders.

Q. And what else?

A. And the contents of the folders.

Q. Don't you also make reference to correspondence files?

A. That is the contents of the folder: One file, contract and correspondence.

Q. Is the correspondence maintained in a separate jacket from the contract file?

A. In several instances it could be and in some instances not. These files are set up that if the folder is small the contract and the correspondence is maintained in the same file folder. If the file becomes large the contract is maintained in one folder and the correspondence in a separate folder.

Q. Have any of those documents up to this date ever been returned to your custody or to the custody of someone who you superintend?

A. Since April 30th?

Q. Yes.

A. No, sir, not to my knowledge.

Q. As far as you know, they continue to be in the exclusive custody of the man to whom you delivered them, Mr. DeNeale?

A. Right.

Q. Among the contracts that you identified was the contract AF33(038) 16916, was it not?

A. Yes, sir.

Q. Can you account for the fact that that contract file was exhibited to me at Wright Field last week by Army personnel?

A. Last week?

Q. Approximately last week. Within I will say the last fifteen days.

A. No, sir, I could not.

Mr. Kelley: If the government please, may you state for what purpose this receipt to which you have referred only certain of it is offered in evidence?

Mr. Aug: We are willing to agree all the items listed in there were turned over to Mr. DeNeale.

Mr. Kelley: If the inference is to be that they continued in Mr. DeNeale's custody without interruption, I object

to its introduction upon the grounds that is not the fact and this witness cannot establish that.

The Court: I don't see any necessity of introducing it in evidence. It is marked as an exhibit. It is simply a receipt. It has been received from Mr. DeNeale. Any point about putting it in evidence?

Mr. Aug: It ties up the fact that these files were turned over to Mr. DeNeale.

The Court: He has testified to that and this seems to bear that out and counsel objects to its going in evidence. I don't see why we don't leave it marked for identification. It is not in evidence then. He has testified to the contracts that appear on here that you turned over to Mr. DeNeale.

The Witness: Right.

The Court: So we will leave this temporarily, at least.

Mr. Aug: Counsel for defense has said we have referred to five PRs. It is my understanding we have had the witness testify to six purchase requests. In order that there may be no question about that, I would like to run over those PRs again and ask whether he has that purchase request in his possession.

The Court: What is it you are asking about now?

Mr. Aug: It was my thought, I had asked him if he had six purchase requests in his possession. Mr. Kelley has said that the witness had testified as to five purchase requests. In order that there be no question about it, I want the record to show that Mr. Kistner had in his possession six purchase requests.

The Court: 119,432, is that your first one that you are asking about?

Mr. Aug: Yes.

The Court: All right. Now let's follow these along with the counts, if you please. That is the purchase request that is referred to in Count 1 of the indictment and is the first purchase request that is referred to.

Mr. Aug: 119,443 is the first one. That is the one referred to in the first count.

The Court: Where is that?

Mr. Aug: On the first page, at the bottom of Count 1, first page.

The Court: Purchase request 119,443, dated August 17, 1959. That is the last line on page 1 of the indictment and that is in count 1. Now, is that purchase request referred to in here? That is the second one on your receipt of April 30th on this receipt, Plaintiff's Exhibit 1 for identification.

The Witness: Yes, sir.

The Court: Now the next purchase request in count 1 is 119,432. That is on page 2 of the indictment. Is that correct, Mr. Aug?

Mr. Aug: That is right, your Honor.

The Court: Is that on your receipt?

The Witness: Yes, sir.

The Court: Now in count 2.

Mr. Aug: Judge, there is another purchase request in count 1. It is 119,450.

The Court: That is right. That is on your receipt?

The Witness: Yes, sir.

The Court: Now, any more in count 1, purchase requests, I mean.

Mr. Aug: No, your Honor, no more purchase requests.

The Court: Now, what is the first one in count 2, according to your papers there, according to the indictment as we have it?

Mr. Aug: 133,766-C.

The Court: All right. Now that is in the second count of the indictment.

Mr. Aug: Yes, your Honor.

The Court: Very well. That is on your receipt.

The Witness: Yes, sir.

Mr. Aug: The next one is 133,709. That is still in the second count.

The Court: 133,709-C. That is on your receipt?

The Witness: With the C it is on here.

Mr. Kelley: At this stage, does that refer to two different purchase orders, one with the C and one without it?

The Witness: It does.

Mr. Kelley: Then you don't have it here.

The Court: On the receipt.

Mr. Kelley: Not the one named in the indictment, your Honor.

The Court: In the second count of the indictment the purchase order that is referred to is purchase request 133,709, dated December 30, 1950.

Mr. Aug: Yes, your Honor.

The Court: Whereas in the receipt it shows 133,709-C, has the letter C attached to it. Do you know of your own knowledge whether or not those are the same documents, or don't you?

The Witness: They are not the same documents, your Honor. They are referred to in the contract.

The Court: You mean, one without the C and one with the C?

The Witness: No, just the one with the C.

The Court: Is referred to in the contract?

The Witness: Yes, sir.

The Court: All right. Go ahead.

Mr. Aug: The other PR then is 127,196.

The Court: That has a C also attached to it in the receipt. That is correct, isn't it?

The Witness: Right.

The Court: Now, with the C attached to it, it is in the receipt. The second count refers to it as purchase order 12719, that is, without the C being on.

Mr. Aug: Those are the six purchase requests, your Honor.

The Court: Are there any purchase orders referred to in count 3?

Mr. Aug: 127,196 is the last one, your Honor, that is referred to in count 3.

The Court: In count 3, it again refers to purchase order 127,196, dated January 2, 1951, without the letter C on it, which appears in this receipt. Are there any other purchase orders now in count 3?

Mr. Aug: Purchase request? No, your Honor. Those are the six that this witness has testified about.

The Court: Are there purchase orders referred to in count 4?

Mr. Aug: They are all referred to but they have already been covered by the ones in that receipt.

The Court: Let's get back to the contracts.

Mr. Aug: The contracts are all right. There was no question about the contracts.

The Court: They might be all right as far as you are concerned, but not as far as I am concerned. I am going to get this straightened out for myself, too. What is the first contract in count 1?

Mr. Aug: 17438.

The Court: 17438 dated November 16, 1950. That you have?

The Witness: Yes, sir.

The Court: Of course, they all have AF33(038).

The Witness: That is right.

The Court: Ahead of all of them. But we won't go into all that detail. That all appears in the indictment. Now the next contract that you have in the first count—What is your next contract in the first count?

Mr. Aug: 18136.

The Court: All right. Now, that was dated December 18, 1950, according to the first count of the indictment. All right. Now your next contract in the first count?

Mr. Aug: 16916.

The Court: All right. Now that is all the contracts in count 1 referred to.

Mr. Aug: That is correct, your Honor.

The Court: Now let's come to count 2. What is the first contract referred to in count 2?

Mr. Aug: 17,438 is again referred to; 18,136 is again referred to.

The Court: Those two we have already had.

Mr. Aug: And the new one is 26,641.

The Court: All right. Dated May 31, 1950, according to the allegation of count 2 of the indictment.

Mr. Aug: And 26,634.

The Court: 26,634, that is in count 2, yes. All right. Dated June 4, 1950. Now the third count, what contracts do we have?

Mr. Aug: We have the 17,438 referred to before; we have 18,136; we have 26,641 and—

The Court: And 16,916, that is one we have had before.

Mr. Aug: 26,641.

The Court: We had that before. All right. That is count No. 3.

Mr. Aug: 26,634 is also in there, your Honor.

The Court: All right, dated June 4, 1951. Now count 4, what contracts are referred to?

Mr. Aug: Again 17,438.

The Court: That is on the receipt.

Mr. Aug: 18,136.

The Court: Yes, sir.

Mr. Aug: The new one is 29,989.

The Court: All right. June 26, 1951, acording to the indictment. Is that all of them in count 4?

Mr. Aug: Yes, your Honor. 16,916 is in there and 26,634.

The Court: I want all the contracts in each count as we come along now, then we will have our record made up.

Mr. Aug: 17,438, 18,136, 16,916.

The Court: All right.

Mr. Aug: 26,634.

The Court: 26,634, yes, sir.

Mr. Aug: 29,989.

The Court: 29,989. All right. Now that is all the purchase orders by number and all the contracts by number and date as appears in the counts 1 to 4, respectively.

Mr. Aug: That is right.

The Court: Leave that with our reporter and she will return it eventually. It is just marked now for identification.

Mr. Aug: I don't want to excuse this witness yet. I would like to ask him one or two more questions.

Mr. Kelley: I had not concluded my intermediary examination.

Mr. Aug: I don't think I had concluded my direct examination, if the Court please.

The Court: You asked him questions on the voir dire about the admissibility of this and you objected to it. I sustained your objection.

Mr. Kelley: I will withdraw and wait for cross then.

The Court: If they wish to examine him some more, you may cross-examine him all you wish.

Mr. Kelley: I will wait for cross.

By Mr. Aug:

Q. Mr. Kistner, you testified you worked out at Wright Field. Are you an employee of the federal government?
A. I am.

Mr. Aug: We are through with the witness.

Cross-Examination, by Mr. Kelley.

Q. You had an opportunity a few moments ago to follow with his Honor certain numbers as to purchase requests that were set forth in the indictment, didn't you?

A. Yes, sir.

Q. Do I understand then it to be the fact that there are two purchase requests set forth in the indictment that you did not deliver to the F. B. I. agent, Mr. DeNeale.

A. By the exact number.

Q. Well, I wish to be exact.

A. The two that you refer to did not have a C on them.

Q. And you say they are different files?

A. I would say that they were.

Q. So then the answer to my question was that you did not deliver two purchase requests that had been enumerated in the indictment?

A. As enumerated, yes, sir.

Q. You did or did not? I mean as enumerated.

A. As enumerated in there, I did not deliver a document by that number.

Q. And to your knowledge, there are two separate documents, each bearing the same numerals, but one having the letter C and the other not?

A. I have no exact knowledge, because I didn't check over the documents without the C.

The Court: Please give us those numbers, will you?

Mr. Aug: Your Honor, you will have to refer to the indictment. I don't know exactly which ones they were.

Mr. Kelley: I have them, your Honor.

The Court: Well, which ones were they?

Mr. Kelley: The indictment lists a purchase request.

The Court: That is in count what?

Mr. Kelley: In count—I am afraid I am not prepared to answer as to count, but I can give you the number, 133,709.

The Court: 133,709. All right.

Mr. Kelley: The receipt bears those numerals but with the addition of a C.

The Court: Now let's find out. If we don't do this, Gentlemen, we are going to get lost in the maze.

Mr. Kelley: Counsel suggests that is in count 2.

The Court: 133,709. Now the indictment, count 2 in the second paragraph thereof, on page 2 says, "and purchase request 133,709, dated December 30, 1950". Now what you have turned over to Mr. DeNeale there is a document which your records show was numbered 133,709-C. That is correct, is it not?

The Witness: Yes, sir.

Mr. Kelley: The other similar discrepancy is No. 127,196.

The Court: What count is that in?

Mr. Kelley: Count 2 likewise.

The Court: Also in count 2. 127,196. Yes, I see it, 127,196. So that the indictment says it is purchase request 127,196, whereas your receipt shows a document that was numbered 127,196-C.

The Witness: Yes, sir.

The Court: Very well. Now you may go ahead. You may examine him about it any way you wish.

Mr. Kelley: Will the Court excuse me one moment?

The Court: Yes, certainly.

Mr. Kelley (after conferring with co-counsel): That is all.

Redirect Examination, by Mr. Aug.

Mr. Aug: Mark this as government's for identification Exhibit No. 2, please.

The Court: Did you want to inquire?

Mr. Svoboda: No inquiry, your Honor.

The Court: That is what Mr. Canny spoke to me about earlier, he and Mr. Aug. But any time that you wish to

examine any of these witnesses, do not hesitate to say so, because you are, of course, entitled to do that, only have one set of lawyers do it at a time, but when the other side gets through, you may be heard. I may not think of it every time. I am extending the invitation now. Not exactly an invitation, you have the right to whether I extend the invitation or not. You let me know, otherwise I will understand you do not care to. Very well.

Q. Mr. Kistner, I am handing you a document which has been marked as Plaintiff's Exhibit No. 2. This is marked for identification. I will ask you to state what number is on that document.

A. 127,196-C.

Q. Now, as to the numbers, is there some difference in the way that that number and the letter is affixed to that document?

A. There is, a letter affixed in ink.

Q. Do you know who would have put that letter on that instrument?

A. No, sir.

Mr. Kelley: I object to the form of that question.

Q. Do you know who put that on there?

A. No, sir.

Q. Do you know what the symbol means, what the letter C means?

A. I have been told.

Mr. Kelley: Object.

The Court: Don't tell us what you have been told. Do you know?

Q. Do you know what the letter C means?

A. No, sir.

Q. After looking at the purchase request numbered 127,196-C, what do you say now as to whether that represents there was more than one purchase request?

Mr. Kelley: Object to that. If your Honor please, the witness has already indicated an inability to answer that question to his own knowledge.

The Court: No.

Mr. Aug: I understand he said there were two.

The Court: He said he didn't know what the symbol C stood for. I think that is a different question from this last one. He may answer the question. If you know, tell us of your own knowledge.

The Witness: I would like to have the question restated, your Honor.

Mr. Aug: Read the question.

(Thereupon the last question was read by the reporter.)

A. I couldn't answer that positively, without checking our files, but I would say—

Mr. Kelley: Just a moment. I object.

The Court: I will sustain that objection. Don't tell us what you would say. You can check your files, can you not?

The Witness: Yes, sir.

The Court: Find out and let us know.

Mr. Aug: Then if we can reserve the right to recall this witness to testify on that question as to these two purchase requests, I see no need for my going through the same set of questions as to this exhibit. I would like to ask that this witness be excused to check his files to see whether there was one or more purchase request.

The Court: See whether there was purchase request 133,703 and also 133,709-C, and see whether there was purchase request 127,196, also another purchase request 127,196-C. Is that right?

Mr. Aug: That is correct.

The Court: That is what you want him to check.

Mr. Aug: That is correct. Through with the witness, your Honor.

Mr. Kelley: May I ask is that the receipt that was marked for identification? May that be left among the court's papers? No questions.

Mr. Aug: The witness is excused then.

The Court: All right. We will see you again when you come back, if you do come back.

And thereupon

MR. JOHN DeNEALE, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. Mr. DeNeale, you know Mr. Kistner; is that correct?
A. Yes, I have met Mr. Kistner.
Q. Have you stated your full name to the jury?
A. No, I haven't. My name is John D. DeNeale.
Q. Where do you live, Mr. DeNeale?
A. I reside in Fairborn, Ohio.
Q. What is your occupation?
A. My occupation is special agent with the Federal Bureau of Investigation.
Q. Now, you heard Mr. Kistner say he had transferred to you certain documentary papers, which we have been talking about; is that correct?
A. I did, sir.
Q. What was the date on which you received them?
A. I received those on April 30, 1952.
Q. I will ask you if on that date you received purchase request 119,432?
A. I would like to refer to that receipt, if I may. (Does so.)
Q. I will ask you if on that date you received from Mr. Kistner purchase request 119432?
A. I did.

Q. I will ask you if you received purchase request 119443?

A. I did.

Q. Did you receive purchase request 119450?

A. I did.

Q. Did you receive purchase request 133766-C?

A. I did.

Q. Did you receive purchase request 133709?

A. The one I received evidently had a C after it in pencil.

Q. What was your answer to that question?

A. The one I received evidently had a C written after it, either in ink or pencil.

Q. Did you receive purchase request 127196-C?

A. Yes, I did.

Q. Did you receive contract No. 17438, with AF—All of these contracts have the prefix AF33(038), so I will refer only to the last numbers. Did you receive contract No. 17438?

A. Yes, I did.

Q. Did you receive contract No. 18136?

A. Yes, I did.

Q. Did you receive contract No. 16916?

A. Yes, I did.

Q. Did you receive contract No. 26641?

A. Yes.

Q. Contract No. 26634?

A. Yes, I did.

Q. Contract No. 29089?

A. Yes.

Mr. Aug: Mark these as Government's Exhibits 4, 5, 6, 7 for identification.

Thereupon four purchase requests were marked for identification as Government's Exhibits Nos. 4, 5, 6, and 7, respectively.

The Court: What is the number of purchase request No. 2 for identification?

Mr. Aug: It is 127196-C.

The Court: Now No. 3?

Mr. Aug: 133709-C.

The Court: Those are the ones the Gentleman is going to check?

Mr. Aug: That is right.

The Court: Now we have Government's Exhibits 4, 5, 6 and 7.

Mr. Aug: No. 4 is 133766-C.

The Court: Where does that appear in our indictment?

Mr. Kelley: Count 2, your Honor.

Mr. Svoboda: Count 2, page 3, second paragraph.

Mr. Aug: It is also in count 3, your Honor.

The Court: Government's Exhibit No. 4, what count does that appear in?

Mr. Aug: It is in counts 2 and 3.

The Court: Now Government's Exhibit for identification No. 5 is purchase order number—

Mr. Aug: —119443.

The Court: Where does that appear, in what count?

Mr. Aug: Count 1 of the indictment. It is only in count 1 of the indictment.

The Court: Now Government's Exhibit No. 6 for identification?

Mr. Aug: 119432. Appears in count 1 of the indictment.

The Court: In any other count?

Mr. Aug: No other count. It is referred to generally in the conspiracy count.

The Court: Now Government's Exhibit No. 7 for identification is purchase order number—

Mr. Aug: —119450.

The Court: And that appears in what count?

Mr. Aug: Count 1. That is all.

The Court: All right. Go ahead.

Q. Mr. DeNeale, I will hand you Government's Exhibit marked for identification No. 4 and ask you to state what that is.

A. This is a purchase request No. 133766 and after it is a C marked in ink.

Q. Can you state whether that is one of the documents that was turned over to you by Mr. Kistner?

A. Yes, it is.

Q. I will hand you Government's Exhibit marked for identification No. 2 and would you state what that is?

A. This is a purchase request No. 127196 and it has a C in it in ink, after it.

Q. Can you state whether or not that was one of the instruments turned over to you by Mr. Kistner?

A. Yes, it was.

Q. I will hand you an instrument marked Plaintiff's Exhibit 3 for identification and ask you to identify that instrument.

A. This is a purchase request No. 133709-C.

Q. I will ask you if that instrument was turned over to you by Mr. Kistner?

A. Yes, it was.

Q. I hand you Exhibit No. 5 marked for identification. Will you tell us what that instrument is?

A. This is a purchase request No. 119443.

Q. And can you state whether or not that instrument was given to you by Mr. Kistner?

A. Yes, it was.

Q. I will hand you Government's Exhibit No. 6, marked for identification, and ask you to identify that.

A. This is purchase request No. 119432.

Q. Can you state whether or not that instrument was given to you by Mr. Kistner?

A. Yes, it was.

Q. I hand you Government's Exhibit No. 7, marked for identification. Will you tell the jury what that instrument is?

A. This is purchase request No. 119450.

Q. Can you state whether or not that instrument was turned over to you by Mr. Kistner?

A. Yes, it was.

Mr. Aug: Mark these three as Exhibits 8, 9 and 10.

Thereupon three contracts were marked for identification as Plaintiff's Exhibits Nos. 8, 9 and 10, respectively.

The Court: No. 8, the number of that is what?

Mr. Aug: No. 17438.

The Court: And that appears in what count or counts of the indictment?

Mr. Aug: Count 1. That is also in count No. 2.

The Court: Let's get this accurately, if you will please. Now tell us all again so we get it accurately in the record what counts that No. 17438 appears in.

Mr. Aug: All right, your Honor. It is in count 1 and it is in count 2.

The Court: Yes.

Mr. Aug: It is in count 3.

The Court: Yes.

Mr. Aug: And it is in count 4.

The Court: That takes in about all of them. All right. Now Government's Exhibit No. 9, that is contract number--

Mr. Aug: —18136.

The Court: And that appears—

Mr. Aug: That is in count 1, count 2, count 3, count 4.

The Court: Yes, sir. All right. That is fine. Now Government's Exhibit No. 10 for identification.

Mr. Aug: That is contract 16916.

The Court: And that is in which count or counts?

Mr. Aug: That is in count 1, count 2, count 3, count 4. Mark these 11, 12, 13 for identification.

Thereupon three more contracts were marked for identification as Plaintiff's Exhibits Nos. 11, 12 and 13, respectively.

Mr. Aug: Your Honor, No. 11 is contract 26641.

The Court: And that is in which count or counts?

Mr. Aug: It is in count 2.

The Court: Yes, sir.

Mr. Aug: Count 3 and count 4.

The Court: Exhibit 12 is number—

Mr. Aug: 12 is contract No. 26634.

The Court: And that is it, what count or counts?

Mr. Aug: It is in count 2, your Honor, count 3 and count 4.

The Court: Exhibit 13 is what number?

Mr. Aug: 13 is contract No. 29989.

The Court: And that is in what counts?

Mr. Aug: It is in count 4, your Honor.

The Court: Only count 4?

Mr. Aug: Only count 4. Your Honor, I have handed counsel for defense the exhibits we have just referred to.

They have indicated to me they would like some time to look them over.

The Court: Do you have any more contracts or purchase orders that you wish to have marked for identification so counsel can have them all during our recess?

Mr. Aug: No other purchase requests, no other contracts your Honor. Those are the ones referred to in the indictment.

The Court: Would you Gentlemen like to have a little opportunity to look them over?

Mr. Kelley: Yes, your Honor. We have had no opportunity to examine these. They haven't been offered as yet.

The Court: I understand. If you do wish to object you may want to develop your reason and so forth. I will give you that opportunity. I think you should have the chance now to look them all over. Suppose I adjourn now until 2 o'clock. Is that satisfactory?

Mr. Aug: That is all right.

The Court: That is all for the present. We don't excuse you, but excuse you temporarily.

The Witness: Yes, sir.

The Court: Now, Members of the Jury, as you can see there are some documents here that will be referred to in the testimony in this case, from time to time, and it will take a little while for counsel to look them over and have an opportunity to study them. I think it is quite proper that they should be given that chance and so I will recess the further hearing of this case now until 2 o'clock this afternoon. Now, during this recess period, why, of coarse, you will bear in mind the usual admonition I have heretofore given you. I won't keep on repeating it all the time. You know what it is. Return, if you please, at 2 o'clock this afternoon. Adjourn court until 2 o'clock this afternoon.

Thereupon the further proceedings in the trial of this cause were adjourned until 2 o'clock of the afternoon of the same day.

Afternoon Session.

Tuesday, May 13, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

MR. JOHN DeNEALE resumed the witness stand and testified further as follows, as on **direct examination**:

By Mr. Aug:

Q. Mr. DeNeale, I will hand you what has been marked for identification as Plaintiff's Exhibit No. 8 and ask you to identify that, if you will, please.

A. This is a contract between the United States Air Force and the S. Buchsbaum & Company.

Mr. Kelley: If the Court please, I object to this method of identification, unless it is established that this witness has some greater knowledge than to merely look at it and see what it purports to be. As I understand he just secured possession of the documents. He is not qualified to interpret what it is.

The Court: Of course, he can't interpret what it is. You may answer the question, I think there is no harm, and tell us what it is. It does speak for itself. There is no doubt about that.

Q. What is the number on that contract, Mr. DeNeale?

The Court: I don't think we want to throw all these contracts in the laps of the jurors and say, "Now, Ladies and Gentlemen, they speak for themselves".

Mr. Aug: This witness is merely going to identify this as an instrument he got from Mr. Kistner. That is the purpose of these questions.

The Court: He did identify them.

Mr. Aug: I ask him to identify the contract number.
A. This is contract No. AF33(438) 17438.

The Court: What is the exhibit number of that?

The Witness: 8.

The Court: Pardon me. That is Government's Exhibit No. 8 for identification.

Mr. Aug: That is right.

The Court: Now what is the number on it, contract number?

The Witness: The end number is 17438.

Q. I will ask you, Mr. DeNeale, if you received that instrument from Mr. Kistner?
A. I did.
Q. I will hand you a document marked as Exhibit No. 9 for identification, Plaintiff's Exhibit No. 9, and ask you to identify that instrument.

The Court: You mean to identify it as being an instrument received?

Mr. Aug: That is correct, and to give the contract number.

The Court: All right. Maybe that will save the objection.

A. This instrument was received from Mr. Jerome Kistner and it is marked Contract AF33(038) 18136.
Q. I will hand you an instrument marked Plaintiff's Exhibit No. 10 for identification and ask you to identify that instrument.
A. This instrument was also received from Mr. Kistner and it is marked Contract AF33(038) 16916.

The Court: That is Exhibit No. 10 for identification.

Mr. Aug: Exhibit No. 10 for identification, yes, your Honor.

Q. I will hand you an instrument marked Plaintiff's Exhibit 11, marked for identification, and ask you to state what that instrument is.

A. This instrument was received from Mr. Kistner and is marked Contract AF33(038) 26641.

Q. I will hand you Plaintiff's Exhibit No. 12, marked for identification, and ask you to identify that instrument.

A. This also was received from Mr. Kistner. It is marked Contract No. AF33(038) 26634.

Q. I will hand you an instrument marked Plaintiff's Exhibit 13, marked for identification, and ask you to identify that instrument.

A. This was received from Mr. Kistner and is marked Contract No. AF33(038) 29989.

Q. Mr. DeNeale, here is an exhibit marked Plaintiff's Exhibit 1 for identification. I will ask you to identify that instrument.

A. This is a receipt that I gave Mr. Jerome Kistner, Wright-Patterson Air Force Base, July 30, 1952, when I received various contracts and purchase requests from him at Wright-Patterson Air Force Base.

The Court: What date was that?

The Witness: April 30th.

The Court: I thought you said "July".

The Witness: April 30th.

Q. You are stating you got these purchase requests and contracts on what date?

A. April 30, 1952.

Q. Have then been in your possession since April 30, 1952?

A. They have.

Q. What would you do with them at night?

A. I would lock them in my file cabinet.

Mr. Aug: Your Honor, at this time, we would like to offer in evidence the instrument identified as Plaintiff's Exhibit No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, No. 11, No. 12 and No. 13. Those are the purchase requests and the contracts which have been testified to by Mr. DeNeale and Mr. Kistner.

Mr. Kelley: We will object to the introduction of each. But at the outset I should like to suggest to counsel for the government that these are not the instruments that have been presented to the other witness. There had been only two exhibits marked for identification when the other witness left the stand. None of these other purchase requests have ever been submitted to the witness Kistner.

The Court: I will sustain the objection to Government's Exhibits 2 and 3 for identification, because those are the ones without the letter C on them and Mr. Kistner was to come back and tell us about them later on.

Mr. Aug: We intend to have him here later on in the afternoon.

The Court: Until he comes to get that cleared up, I will sustain the objection.

Mr. Kelley: I have additional grounds which I wish to be heard on beyond that, your Honor. I wish to add further that as to Exhibits 3 through 13 they have never been submitted to the witness Kistner at all. He left the stand before they were ever marked.

The Court: He testified he got them from him. I will overrule the objection to all these exhibits excepting 2 and 3. Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 are all admitted in evidence over the objection of counsel for defendants.

Mr. Kelley: Your Honor, I respectfully refer to the fact I had not yet expressed myself fully on my grounds of objection. May I make my record?

The Court: I am sorry. I thought you had finished.

Mr. Kelley: No, sir. I have several other grounds for objection which perhaps will take me some five minutes to recite. May we make it at the Bench or would you prefer to have me make it here?

The Court: All right. Go right ahead.

Mr. Kelley: Do you suggest I make it from here or at the Bench?

The Court: Yes. Go ahead. Members of the Jury, you understand all you are interested in is what the witnesses testify to and the Court will charge you as to the law. What counsel may state as to their objections, they have a perfect right to state; they have a right to make up their record. Anything in their statements has nothing to do with your consideration of this case at all. They are purely a matter of law. Counsel are entirely within their province to make their objections and state them and I think now is the time to do it.

Mr. Kelley: If the Court please, as to Government's Exhibits 4, 5, 6 and 7, which purport to be purchase requests, as to those, we object to their receipt in evidence upon the ground that they are neither relevant nor material to any issues established by the indictment. They do not serve in the slightest degree to support the allegations of the indictment as respects the commission of a crime.

Now, as to the contracts, so-called contracts which have been marked for identification Exhibit 8 through Exhibit 13, I interpose my objection at one stage and the Court ruled. I have as yet had no opportunity to interrogate the witness concerning any of those exhibits on a voir dire. They are referred to as contracts. No one in this court has undertaken to say what they are. We merely have testimony that this man received them from Wright Field period. That is all.

The Court: He started to tell us a while ago there were some contracts. I will overrule the objection. They are admitted in evidence over the objection of counsel for

defendants and the jury will consider those documents as evidence in this case.

Mr. Kelley: I wish to be respectful, sir, but may the record show my request for voir dire has been denied?

The Court: Yes, sir. You may cross-examine him all you wish but I am not going to stop on every paper admitted here and have a voir dire examination or we will not be through in time for them to repaint and redecorate this building, which starts on the 1st of July. Go ahead.

Mr. Kelley: Your Honor, may I make this statement: I understand the rule that an exception need never be noted in this court to any of the Court's rulings?

The Court: No, they don't have to be. They are always welcome and I always note them for counsel myself, but there is no law requires it. The rules now state it isn't necessary. However, if you wish to take your exceptions, you may always do so, but it isn't necessary like it used to be under the old law. Go ahead.

Thereupon the said four purchase requests being Nos. 133766, 119443, 119432 and 119450, respectively, and five contracts beings Nos. 17438, 18136, 16916, 26641, 26634, and 29989, respectively, were admitted in evidence and marked as Plaintiff's Exhibits Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, respectively.

Mr. Aug: Through with the witness, your Honor.

Cross-Examination, by Mr. Kelley.

Q. Mr. DeNeale, I hand you what have been marked and received in evidence as Government's Exhibits 8 through 13. Is it your testimony that each of those exhibits constitutes a contract between the United States Government and some individual?

Mr. Aug: Objection. Now, your Honor, we are getting into exactly what Mr. Kelley would not let us get into and to what we had no intention of getting into. We intended

to authenticate those records and have them admitted in evidence. If we develop what those contracts are, it will be by a different witness.

The Court: I will sustain the objection. The documents speak for themselves. I think that is what counsel stated. I think that is true. We can't do it all at one time. I will sustain it.

Mr. Kelley: I may not inquire of this witness as to what they are and he is the only man who has identified them.

The Court: I will sustain the objection. Go ahead.

Mr. Kelley: Exception noted, please. In view of the ruling, there will be no further cross-examination.

Mr. Aug: We would like to excuse this witness with permission to call him back at a later time to develop other phases of this case.

The Court: That is all right.

Mr. Aug: Call Ruth McCally.

And thereupon

RUTH E. McCALLY, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. Will you state your full name?
A. Ruth Evan McCally.

The Court: Miss or Mrs.?

The Witness: Mrs.

Q. Where do you work?
A. Civilian Personnel Division, Wright-Patterson.
Q. Are you a government employee?
A. Yes, sir.
Q. Do you live in Dayton?
A. Yes, sir.

Q. How long have you been out at the Field?

A. I have had two periods of employment, the first one from 1941 to 1947 and the second period from 1949 until the present time.

Q. Now will you describe briefly what your duties have been since the year 1949?

A. When I first went back to the Field I was in the Personnel Department, Civilian Payroll. Since July of 1951 I have been with the Civilian Personnel Division, in charge of the Civilian 201 Files, official personnel folders.

Q. What is the 201 file?

A. Official personnel folder for the civilians of the Wright Air Development Center.

Q. And those files are in your custody?

A. That is right, they are.

Mr. Kelley: If the Court please, it is our informal understanding that counsel for the government intend to offer this entire jacket. It consists of many many pages. We have never seen it before. It relates to the personal history of one of the defendants and I must request some time to examine it. It is rather voluminous.

Mr. Aug: It is our purpose to expedite this, to have the file introduced and ask this witness to read from just parts of this file. Now, rather than tear the whole file apart and get the parts we want of this personnel file from out at Wright Field, this witness is qualified to investigate this file and answer questions.

The Court: You are not going to offer it in evidence.

Mr. Aug: The simplest way would be to offer it in evidence and have her comment.

The Court: You are not going to offer it in evidence.

Mr. Aug: I had planned to.

The Court: The whole file?

Mr. Aug: Well, if I don't do it that way, I have to pull the file apart.

The Court: No, I don't think you do. I think you can have the file marked for identification and let her read so much of it as is pertinent to this case. If it is all pertinent, you say everything in there is pertinent to this case, then I am going to have to give counsel time to look into it. I can't expect the Gentlemen to look into it without an opportunity. If you just want to have parts of that not offered but simply read from, marked for identification, I think it will take care of it, if you care to do that.

Mr. Aug: Mark it as Government's Exhibit No. 14 for identification.

Thereupon said folder was marked for identification as Plaintiff's Exhibit No. 14.

Q. Mrs. McCally, will you take possession of that exhibit marked for identification Exhibit 14 and tell the jury what that file purports to be?

A. Personnel folder and contents pertaining to the personnel while the employee is at the Field. It shows his date of appointment, his oath of office, any changes in pay while he is at the Field, his date of resignation, the reason for resignation or separation, I should say, type of separation.

Q. Will you tell the jury whose file it is?

A. This is the file of Robert G. Hollifield.

Q. Will you examine that file and tell the jury when Mr. Hollifield was first employed as an employee of the Federal Government, at Wright Field?

Mr. Kelley: If the Court please, I should like to interpose an objection to this question. We have no objection, of course, to its being identified, but now if counsel seeks to come to one part of that and have her read it into the record, I think he should offer that part in evidence first and give us a chance to look at it.

The Court: He is asking her to read it now in evidence.

Mr. Kelley: But no part is in evidence. It is not offered as yet. We haven't seen that part.

The Court: Have you got the part to answer his question?

The Witness: Yes, sir, I have.

The Court: All right. Don't read it. Take it down and show it to counsel. Just show the part you are going to read. You go down there and show exactly what you are going to read.

The Witness (Does as requested by the Court.)

Mr. Kelley: Do I understand that the government is offering in evidence so much of the record as this witness will testify to now, in response to your question, from this page?

The Court: No. They are not offered in evidence at all. She is going to read from a document that has been marked Government's Exhibit No. 14 for identification.

Mr. Kelley: No part of which has yet been received in evidence.

The Court: It will be if you give her a chance to read it.

Mr. Kelley: The very fact of her reading it places it in evidence, your Honor.

The Court: Sure, exactly. What do you wish me to do? You object to it all going in and I think properly so, because there may be many things in there are not pertinent here. Now they have reached one place that they think there is something pertinent. Instead of tearing that out of that file, we are going to have this lady read it. Is there objection to that?

Mr. Kelley: No. I take it, however, so much of this record is actually being read into evidence through this witness. So, a certain portion of this, without physically removing it, is being offered and received in evidence. I can't understand it any other way.

The Court: Have you asked her the question to read that?

Mr. Kelley: There is merely a question to read from a document.

The Court: I will overrule the objection. Let's get along with our case.

Mr. Kelley: If your Honor please, we feel we are only performing our duty in this case.

The Court: I understand you are. Go ahead.

A. Mr. Hollifield's confirmation of probational appointment, November 14, 1941.

Q. Now will you examine that file, Mrs. McCally, and state whether from an examination of that file Mr. Hollifield is an employee of the Federal Government in July of 1950?

Mr. Kelley: If the Court please, for the record, I must state my objection, technical though it may be. I object to her reading anything from that record until the portion from which she reads has been offered and received in evidence.

The Court: Very well. I will overrule the objection. Go ahead.

A. July of what year?

Q. 1950.

A. Yes, sir, he was an active employee.

Q. Beg pardon. That means they are on the payrolls actively employed.

A. That is right.

Q. In what capacity?

The Court: When was this?

Mr. Aug: July 1950.

The Witness: July 1950.

A. He was a designer, aviation equipage.

Q. Can you examine that file and tell us if he remained in that capacity until the time of his resignation or separation from the Field?

Mr. Kelley: Same objection, if your Honor please.

The Court: Very well. It is overruled.

A. He did not. He received a promotion effective October 1, 1950 from a designer, aviation equipage, to a designer supervisor, aviation clothing and equipage.

Q. Will you examine that record and tell us, if you can, please, the time of his discharge or separation from the Field?

A. He resigned effective September 27, 1951 in lieu of removal.

Mr. Kelley: Your Honor, to avoid repetition, may it be understood my objection goes to every question of this nature, requiring her to read from the exhibit?

The Court: All right. I will overrule the objection.

Mr. Kelley: May it be understood my objection goes to it all? I won't have to repeat it each time.

The Court: That is right. What is the date?

The Witness: September 27, 1951.

Q. Would you turn please to the page which indicates the promotion of October 30, 1950?

A. It is October 1st.

Q. October 1, 1950.

A. That is the official document there.

Mr. Aug: If your Honor please, we would like to offer in evidence that portion of the plaintiff's exhibit marked No. 14 for identification, which is entitled "Notification of Personnel Action".

The Court: Do you want to take it out of there?

Mr. Aug: We will take it out.

The Court: Make that 15.

Mr. Aug: We offer it in evidence, if the Court please.

The Court: All right. It may be admitted.

Mr. Kelley: Has it been received?

The Court: Yes. That is what I understood.

Mr. Kelley: It has never been tendered to us even for examination, your Honor.

The Court: Please show these things to counsel for defendants, so there won't be any more time taken about these documents, and show them to counsel for both defendants separately—each and separately and respectively.

Mr. Kelley: No objection as to defendant Opper.

Mr. Svoboda: No objection as to defendant Hollifield.

The Court: It may be admitted without objection.

Thereupon said document entitled "Notification of Personnel Action", dated September 30, 1950, was admitted in evidence, marked as Plaintiff's Exhibit No. 15.

Q. Mrs. McCally, will you turn to that portion of the personnel file which relates to the resignation or separation of Mr. Hollifield from the Field?

A. Yes, sir. Right here it is.

Q. May I have it?

A. (Witness hands document to counsel.)

Mr. Aug: Mark it 16 for identification. "Notification of Personnel Action" is the title of the instrument.

Thereupon said document was marked for identification as Plaintiff's Exhibit No. 16.

Mr. Kelley: May we approach the bench, your Honor?

The Court: Yes, sir.

(Out of the hearing of the jury):

Mr. Kelley: Would your Honor acquaint himself with that portion of the exhibit offered? We object to it.

The Court: I think that objection is well taken.

Mr. Aug: May I see it, if your Honor please?

The Court: Why do you have to have that in evidence?

Mr. Aug: I don't think we need it. What I want to do is to get the date of the separation.

The Court: She testified he resigned.

Mr. Aug: These Gentlemen have been objecting to that testimony. To protect the record I am putting in the evidence from the file. I am not interested in this.

The Court: I can't see the slightest objection in the world to reading from documents marked for identification. I can see nothing wrong about that. I think this is objectionable.

Mr. Aug: We will separate the first page.

(In the hearing of the jury):

The Court: I will sustain the objection to any comments.

Mr. Aug: We are offering so much of that instrument which would show the date of his resignation, if the Court please.

The Court: Can you get a photostatic copy of the upper part of this here and substitute that?

Mr. Svoboda: I will stipulate as to the date of resignation.

Mr. Aug: It has been stipulated that Hollifield resigned from the Field as of the date of that instrument. Now let's make sure we have that.

Q. Would you tell the jury what the date of Hollifield's resignation from the Field was?

A. Resignation effective September 27, 1951.

Mr. Svoboda: We will stipulate as to that date.

Q. Mrs. McCally, from an examination of that file, are you in a position to state whether Hollifield was employed

at the Field during the period from October 1, 1950 until the date of his resignation?

A. Yes, sir. He was employed.

Q. And would you tell the jury in what capacity?

A. You have the title on—that. Effective October 1, 1950 until the date of resignation, he was a designer supervisor, aviation clothing and equipage.

Q. Does it mention the unit he was employed in?

A. At the time of resignation he was in the Research Division, Aero Medical Laboratories, Medical Specialties Branch.

Q. Was he in that division at the time of his promotion?

A. He was not. Beg pardon. He was probably in the same capacity. The title of the division was changed due to the reorganization of the Wright Air Development Center.

Q. Do you have the description—Is there in that file a description of the duties that Hollifield performed out at Wright Field?

A. Yes, sir, there is a job description attached here to this promotion action of October 1, 1950.

Q. Is that attached to what has been identified and admitted into evidence as Plaintiff's Exhibit No. 15?

A. It is.

Q. I will ask you to read to the jury what Hollifield's duties were at Wright Field.

A. "Engineering Division, Aero Medical Laboratory, Medical Specialties Branch, Land Survival Unit. Supervision Received: Works under general supervision of the Chief, Medical Specialties Branch, with opportunity for wide use of creative initiative and independent judgment in planning and supervising the accomplishment of land survival equipment.

"Major Duties:

"1. As Chief, Land Survival Unit, formulates unit policy and assists the Branch Chief in establishing Branch policies and procedures. Represents the Laboratory at meet-

ings with the Joint Aircraft Committee, Aeronautical Board, Bureau of Aeronautics and Air-Sea Rescue Board regarding land survival equipment policies.

"2. Receives and discusses with supervisor, requirements for land survival equipment assigned to or initiated by the Unit. Considers problem and probable approaches; determines personnel to whom assignment will be made. Evaluates proposed development; reaches estimates with respect to time, facilities, personnel, nature and cost of materials, and initiates Expenditure Order to open project.

"3. Makes assignments to subordinates. Coordinates individual or combined efforts of project designers; supervise, assists, offers aid and advice and constructive criticism. Maintains liaison with other laboratory branches, and other laboratories, to insure that survival equipment developed will not conflict with the use or operation of other equipment in aircraft or on crew members.

"4. Reviews and discusses first samples produced to eliminate or concentrate on design ideas with respect to functional suitability; to determine compliance with specifications and drawing requirements. Approves and coordinates the planning and accomplishment of experimental design tests.

"5. Supervises, reviews and approves tentative specifications prepared by subordinates to determine that requirements are adequate. Reviews reports of subordinates for validity and accomplishment of objectives. Receives and initiates or coordinates correspondence to and from AMC laboratories, other government agencies and industrial organizations relating to research, development, procurement, inspection, or pre-standardization testing of assigned projects, in order to keep abreast of new trends in materials.

"6. Prepares monthly and quarterly reports reflecting project status. Evaluates land survival equipment requirements and suggestions received from other AMC activities, other commands, industry, or inventors and initiates action to investigate and or activate development.

"7. Personally designs or develops personal survival kits in addition to other duties.

"8. Performs other duties as designated."

Mr. Aug: We are through with this witness, your Honor.

Mr. Kelley: No cross-examination as to the defendant Opper.

Mr. Svoboda: No cross-examination as to the defendant Hollifield.

The Court: That is all.

The Witness: Who do I return this file to?

The Court: That is marked for identification. Better leave it with Miss Fischer. It is not in evidence, that is, the whole document.

And thereupon

MAJOR ROBERT MELVIN PAULSON, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. Will you state your full name, please?
A. Robert Melvin Paulson.
Q. Where do you live, Major Paulson?
A. 1837 Pinecrest Drive, Dayton, Ohio.
Q. And your employment?
A. I am employed by the United States Air Force, at Wright-Patterson Air Force Base, Ohio.
Q. Can you tell us what you are doing out there at the present time?
A. I am the Chief of the Aerial Reconnaissance Unit of the Armament Section of the Electronics Branch of the Procurement Division.
Q. What were you doing before that?
A. I was chief of the—

Mr. Kelley: I didn't get all of that.

(Thereupon the last A. on Page 92 and top of page 93 was read by the reporter.)

Q. How long have you been employed in that capacity?

A. Since January of this year.

Q. January 1952. What were you doing before that?

A. I was the Chief of the Survival Equipment Unit, Materiels Branch of the Materiel Section of the Procurement Division.

Q. And how long were you in that capacity?

A. I started in that capacity in July of 1951.

Q. Now will you tell us, briefly, what your duties were in that capacity?

A. I was in charge of the procurement of parachutes, survival kits and related equipment, such as aerial drop and aerial delivery equipment for the Air Force and in some instances for the Department of the Army. And in this capacity we procured all of these equipments that I have mentioned before and we administered the contracts that were let. We placed the contracts. We placed them through both advertising and negotiation.

Q. Now, Major Paulson, I will call your attention to contract 17438. Was that a contract over which you had supervision at the time?

A. Yes, that is one of the contracts.

The Court: That is Exhibit 8.

Mr. Aug: Yes, your Honor.

The Court: For our record.

Mr. Aug: That's right.

Q. I will ask you, Major Paulson, if contract 18136 was a contract over which you had supervision?

A. Yes, that was one.

Mr. Aug: That is No. 9, your Honor.

The Court: That is right.

Q. I will ask you if contract 16916 was a contract over which you had supervision?

A. Yes, it was one of my contracts.

Mr. Aug: That is No. 10.

Q. I will ask you if contract No. 26641 is a contract over which you had supervision?

A. Yes, it was one of my contracts.

Mr. Aug: That is No. 11.

Q. I will ask you if contract 26634 was a contract over which you had supervision?

A. Repeat that, please.

Q. 26634.

A. Yes, that is correct.

Mr. Aug: That is No. 12, your Honor.

Q. I will ask you if contract 29989 is a contract over which you had supervision?

A. That is correct.

The Court: That is Exhibit 13.

Q. Major Paulson, I will hand you a document labeled Plaintiff's Exhibit No. 4 and ask you to identify it please.

A. This is a purchase request 133,766, dated 6th of January 1951. It is authority for the procurement of 8500 each kits, emergency sustenance, Aircraft, Type D-1, in accordance with spec. MIL-S-5775A, dated 28th of August 1950.

Q. Now, Major Paulson, can you tell us what a purchase request is?

A. A purchase request is a document initiated by one of the Air Force's activities. In this case, this one was initiated by the Supply Division, to fulfil a requirement that has been generated in some of the operating activities of the Air Force. Evidently from this purchase request I would say one of the operating activities of the Air Force. Now they evidently needed these kits to fulfil some

need in the performance of their mission. Their requirement has been consolidated in one of the supply classes of the Air Force out at Wright Field and they initiate this piece of paper or this document so that a purchase could be effected by the Procurement Division. I might add here that this document also allocates the proper amount of funds for the fulfilment of this purchase.

Q. Is there anything, Major Paulson, on the purchase request which indicates what contract they may ultimately become a part of?

A. Yes. There is a document attached to the purchase request, as required by the regulations of Wright Field, which shows which contract resulted from this purchase request.

Q. Look at the document attached and tell the jury what contract resulted out of that purchase request?

A. On this particular purchase request there were three contracts or three amendments to contracts that resulted. 6000 of the 8500 units on this contract were placed on contract AF26641 with S. Buchsbaum & Company, of Chicago, Illinois. 1250 units were placed by change order to contract AF17438 with the S. Buchsbaum & Company, and 1250 units were placed on contract AF18136 with S. Buchsbaum & Company, of Chicago, Illinois.

Q. Major Paulson, I will hand you—

Mr. Kelley: None of us at our table were able to make a note of what he testified to.

Q. Major Paulson, you have been handed Government's Exhibit No. 5. Will you tell the jury what that is, please?

A. This is purchase request 119443, dated 17th August 1950, for 5000 each kits, emergency sustenance, Aircraft Basic Type D-1, in accordance with military specification MIL-S-5775A, dated 28 August 1950.

Q. Now, Major Paulson, from an examination of that exhibit, can you tell us what contracts resulted as a result of that purchase request?

A. This purchase request does not specifically set aside the units awarded on each contract. However, two con-

tracts did result. The first is AF18136 with S. Buchsbaum & Company, Chicago, Illinois. The second is AF17438 with S. Buchsbaum & Company, Chicago, Illinois.

Q. Major Paulson, I have just handed you Plaintiff's Exhibit No. 6. Would you identify that instrument for the jury, please?

A. This is purchase request 119,432, dated 31 July 1950, authorizing the purchase of 10,000 each sustenance kit, individual long-range, Spec. MIL-S-6216, Type E-1, dated 24 August 1950.

Q. Is there anything on that purchase request, Major Paulson, which indicates what contracts resulted from that purchase request?

A. One contract resulted, contract AF16916 with Cappel-MacDonald & Company, Dayton, Ohio.

Q. Major Paulson, I have handed you Government's Exhibit No. 7. Would you identify that instrument to the jury and tell them what it is?

A. This is purchase request 119,450, dated 14 September 1950, for 4200 each sustenance kits, individual, long-range, Type E-1, in accordance with military Spec. MIL-S-6216, dated 24 August 1950.

Q. Will you examine the exhibit and tell the jury what contracts resulted from that purchase request?

A. Contract AF 16916 with Cappel-MacDonald & Company, Dayton, Ohio.

Q. Major Paulson, I have handed you Plaintiff's Exhibit No. 11. Can you tell the jury what that exhibit is?

A. This is a purchase order between the United States Air Force and the S. Buchsbaum & Company, of 1737 South Michigan Avenue, Chicago, Illinois, numbered Contract AF33(038) 26641, dated 31 May 1951. The dollar value of this contract is $425,800.

Q. Major Paulson, is there anything on that instrument which indicates which purchase request that contract resulted from?

A. Yes, there is. This resulted from purchase request 133,766-C.

The Court: That is Exhibit 4 in this case.

A. (Continued) I might further identify this document by saying that it is for 6000 kit, emergency sustenance, Aircraft Basic Type D-1.

Q. Major Paulson, I have handed you Government's Exhibit No. 10. Will you tell the jury what that contract is?

A. This is a contract between the Department of the Air Force and Cappel-MacDonald & Company, numbered AF33(038) 16916. The dollar value of this contract is $3,184,918. It is dated 30 October 1950. It results from purchase requests 119,432 and 119,450.

Q. Major Paulson, will you examine that contract and state whether there is any provision under the terms of that agreement as to the type of material that is to be furnished under it?

A. The type of material is specified in Item 1, in clause 32. It is for 14,200 sustenance kits, individual, long-range, Type E-1, in accordance with specification MIL-S-6216, dated 24 August 1950, "as amended by paragraph B below, provided that Exhibit MCREXD5-45 dated 30 August 1950, attached hereto and hereby made a part hereof, shall be used in conjunction with AN Drawing AN229 as additional requirements to said Specification MIL-S-6216."

Q. Major Paulson, is there anything in that contract that has to do with the furnishing of war surplus material?

A. Yes. Subparagraph H, of Clause 32 says as follows—reads as follows: "It is hereby understood and agreed that no war surplus material and/or parts will be used in the manufacture of any equipment called for herein except as may be authorized in writing by the Contracting Officer."

Q. May I see the paragraph you have just read from?

A. (Witness points to paragraph.)

Q. Major Paulson, I will hand you Plaintiff's Exhibit No. 12 and ask you to tell the jury what that is.

A. This is a contract between the Air Force and Cappel-

MacDonald & Company, numbered AF 26634 which resulted from purchase request PR 133,709-C.

Mr. Kelley: Just a moment. The witness is now relating this contract to a purchase order that is not in evidence. That was one of the two—

Mr. Aug: The contract is in evidence.

The Court: The contract is in evidence but this purchase order is not in evidence. Isn't that correct?

Mr. Aug: That is correct, your Honor.

Mr. Kelley: I am objecting to his mentioning the purchase order in connection with this contract when the purchase order is not in evidence.

The Court: Well, as far as you have gone it is all right. I don't think you ought to go into these two purchase orders until you get them in evidence.

Mr. Aug: Very well, your Honor.

The Court: I will sustain the objection to that.

Q. Is there anything in that contract, Major Paulson, about the furnishing of war surplus material?

A. Yes. In part 1, subparagraph E: "It is hereby understood and agreed that no war surplus material and/or parts will be used in the manufacture of any equipment called for herein except as may be authorized in writing by the Contracting Officer."

Q. I will hand you Government's Exhibit No. 13, Major Paulson. Will you tell the jury what that is?

A. This is a contract between the Air Force and Cappel-MacDonald & Company, numbered AF 29989.

Q. Is there anything in that contract, Major Paulson, which has to do with the furnishing of war surplus material?

A. Yes. Part 1, paragraph G: "It is hereby understood and agreed that the articles and supplies called for herein shall not be manufactured from war surplus material

and/or parts, except as may be authorized in writing by the Contracting Officer."

Q. I will hand you Plaintiff's Exhibit No. 9, Major Paulson, and ask you to tell the jury what that is.

A. This is a contract between the Air Force and S. Buchsbaum & Company, numbered AF 18136, for 2500 each kit emergency sustenance, Aircraft Basic Type D-1, in accordance with MIL-Spec. MIL-S-5775-A, dated 20 August 1950.

Q. Is there anything in that contract, Major Paulson, with respect to the furnishing of war surplus material?

A. Note 1 under Item 1 reads as follows: "In the event that the end products or component parts thereof to be furnished under this bid have been previously Government-owned, or have been retained on contract termination inventory or have been acquired by the bidder at any sale of Government surplus property and no value has been added to such property by modification, overhaul or improvement such fact will be stated by the offering bidder."

Note 2, under Item 1: "Any bidder offering such products as indicated above shall furnish a certification, attached to the bid, to the effect that the products being offered are strictly in accordance with the latest revision to any specifications or drawings referenced herein, and further, that all inspection requirements called out in any referenced specification can be met by the bidder."

Q. This is Government's Exhibit No. 8, Major Paulson. Would you tell the jury what that instrument is?

A. This is a contract between the Department of the Air Force and S. Buchsbaum & Company, numbered AF 17438.

Q. Is there anything in that contract, Major Paulson, having to do with the furnishing of war surplus material?

A. There doesn't appear to be.

Mr. Aug: Your Honor, counsel for both Government and defense would like a five-minute break, if it meets with the approval of the Court.

The Court: Yes. Take a little recess, Members of the Jury.

Thereupon a short recess was had.

Q. Major Paulson, on contract 16916 you have testified that the contract provides for the Type E-1 kit. Are you familiar with the specifications for that kit?

A. Yes. I read the specifications.

Q. Do you recall what number the specifications were?

A. No, I don't recall the number.

Q. The contract provides specification MIL-S-6216. Are you familiar with the provisions of that specification?

A. Yes, I believe I am.

Mr. Aug: Mark this 17 for identification. This is Specification MIL-S-6216.

The Court: All right.

Thereupon said specification MIL-S-6216 was marked for identification as Plaintiff's Exhibit No. 17.

Q. I will hand you Plaintiff's Exhibit Number 17, marked for identification, and ask you to identify that instrument.

A. That is a military specification numbered MIL-S-6216, dated 24 August 1950.

Q. I will hand you Plaintiff's Exhibit No. 10 and ask you to read what specifications that contract calls for.

A. Sustenance kits, individual, long-range, Type E-1, in accordance with military spec. MIL-S-6216, dated 24 August 1950.

Q. I will ask you if you can identify the exhibit numbered 17 as the specification called for in the contract?

A. Yes, that is the specification called for.

Mr. Aug: We would like to offer the specification into evidence, if the Court please.

Mr. Kelley: I wish to state my objection for the record. Since the contract that the witness says is identified with this specification was received in evidence without grant-

ing to the defendants the right to inquire on the voir dire and without adequate identification, I add to this offer of Government's Exhibit 17 our objection that it has not been properly identified through the foundation of the contract itself.

The Court: Very well. Overruled.

Thereupon said specification MIL-S-6216 was admitted in evidence and marked as Plaintiff's Exhibit No. 17.

Q. Major Paulson, looking at Government's Exhibit No. 17, I call your attention to the pro. ision contained therein with respect to goggles. Will you read from that exhibit to the jury and tell the jury what is called for by that specification with respect to goggles?

A. Paragraph 3.2 of this specification MIL-S-6216 sets forth a list of the components in this kit. A component in Table 1, component No. 20 is "Goggle, Ski-Mountain, Type 1" in accordance with Spec. JAN-G-1134, one each goggle should be in the kit.

Mr. Aug: Mark this for identification as Exhibit 18.

Thereupon said specification was marked for identification as Plaintiff's Exhibit No. 18.

Q. I hand you this instrument marked Plaintiff's Exhibit 18 for identification. Major Paulson, will you tell the jury what that instrument is?

A. That is specification JAN-G-1134, dated 24 June 1949. It is National Military Establishment Specification for goggles, Ski-Mountain.

Q. Did you examine that? Is this, Major Paulson, the specification referred to in specification MIL-S-6216?

A. Yes, sir, it appears to be.

Mr. Aug: We would like to offer Plaintiff's Exhibit No. 18 into evidence, if the Court please.

The Court: What contract does that refer to?

Mr. Aug: Your Honor, the contract is 16916. The contract calls for specification 6216. Specification 6216 as far

as goggles are concerned calls for Type 1 of JAN-G-1134, specification. This is JAN-G-1134.

Mr. Kelley: We interpose the same objection as was made in connection with Exhibit 17.

Mr. Aug: Is it in evidence, your Honor?

The Court: Same objection?

Mr. Kelley: Same objection as we interposed in connection with Exhibit 17.

The Court: Yes, it is admitted in evidence, but over the objection, of course.

Thereupon specification JAN-G-1134 was admitted in evidence and marked as Plaintiff's Exhibit No. 18.

Q. Major Paulson, I will ask you to examine Government's Exhibit No. 18 and see what there is in there with respect to the specifications as to Type 1 goggle requirements of Type-1 goggle.

A. In this specification in paragraph B, Type and Size, paragraph B-1a specifies a Type-1 goggle as having a "laminated glass lens, as hereinafter specified."

Q. Are there other provisions in there, Major Paulson, as to the Type-1 goggle?

A. Yes. There is a detailed description of the type of lens to be furnished.

Q. Major Paulson, I will call your attention to page 4, paragraph E-1g(6) of this specification Government's Exhibit No. 18 and ask you to read that provision.

A. May I have that again?

(Thereupon the last question was read by the reporter.)

A. This paragraph reads: "The Type 1 lens shall be colored, laminated, non-shatterable, flat, ground and polished glass. Shall be of shape and size as illustrated in Figure 4 and shall fit tightly and evenly into frame herein specified."

Q. Now, Major Paulson, you are familiar with the contracts involving the D-1 kit. I hand you Plaintiff's Exhibit No. 8 which you have identified as contract 17438. What are the specifications called for in that contract?

A. This contract makes reference to kits emergency sustenance, Aircraft Basic Type D-1, in accordance with specification MIL-S-5775A, dated 28 August 1950.

Q. Now I will hand you Plaintiff's Exhibit No. 11 which you have identified as contract No. 26641 and ask you what specifications are called for in that contract?

A. Kit emergency sustenance, Aircraft Basic Type D-1, in accordance with military specification MIL-S-5775-A, dated 28 August 1950.

Q. I will hand you Plaintiff's Exhibit No. 9 which has been identified as contract 18136, identified and in evidence as that contract. What are the specifications called for in that contract?

A. This contract calls for kits emergency sustenance, Aircraft Basic Type D-1, in accordance with military specification MIL-S-5775-A, dated 28 August 1950.

Q. Now those three contracts provide for D-1 kits; is that correct, Major Paulson?

A. That is correct.

Q. And they all refer to the same specifications; is that correct?

A. Yes, sir.

Q. Are you familiar with the specification MIL-S-5775-A?

A. Yes, sir.

Mr. Aug: Identify this as 19.

Thereupon said document was marked for identification as Plaintiff's Exhibit No. 19.

Mr. Aug: Your Honor, a point has been raised as to a paper that is attached to this particular exhibit. I think it would provide a fair breaking point while we consider off the record the objection made by the other counsel.

The Court: Now you have Government's Exhibit 19.

Mr. Aug: Just marked for identification, yes, your Honor. They have raised a point about the amendment that is attached to this specification, which I would like to have an opportunity to think over and it looks like a good time to break off, your Honor, if you are so inclined.

The Court: I have no objection. Do you want the Major back tomorrow?

Mr. Aug: Oh, yes, yes.

The Court: I just want to take this opportunity to issue an order to a Major. I don't have that chance very often. So, you return tomorrow morning by 11 o'clock.

Now, Members of the Jury, we are about to recess the further hearing of this cause until tomorrow morning at 11 o'clock. During this interval you will bear in mind my usual admonition. Return here, if you please, at 11 o'clock tomorrow morning.

Adjourn court until 11 o'clock tomorrow morning.

Thereupon the further proceedings in the trial of this cause were adjourned until tomorrow morning at 11 o'clock.

Morning Session.

Wednesday, May 14, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted the trial of this cause proceeded as follows:

The Court: Counsel may proceed.

MAJOR ROBERT M. PAULSON resumed the witness stand and testified further, as follows:

By Mr. Aug:

Q. Major Paulson, I will hand you Government's Exhibit No. 8, which you have identified as being contract 17438.

Would you state what specification is called for in that contract?

A. This contract calls for Type D-1 sustenance kits, in accordance with specification MIL-S-5775A, dated 28 August 1950.

Q. I now hand you Government's Exhibit No. 9 which has been identified as contract No. 18136 and ask you what specification is called for in that contract?

A. D-1 kits in accordance with military specification MIL-S-5775A, dated 28 August 1950.

Q. I now hand you Government's Exhibit No. 10 which is contract 16916 and ask you what specification is called for by that contract?

A. These are Type E-1 kits in accordance with military specification MIL-S-62166, dated 24 August 1950.

Q. I will hand you Government's Exhibit No. 11, Major Paulson, and ask you what kit and what specification are called for in that contract?

A. That is sustenance kit Type D-1, in accordance with Spec. MIL-S-5775A, dated 28 August 1950.

Q. Those three contracts calling for the D-1 kits were all under your supervision; isn't that correct?

A. Yes, sir.

Q. And you are familiar with the specification MIL-S-5775A?

A. Yes, sir.

Mr. Aug: Your Honor, this has been marked for identification as Exhibit 19, that is specification 5775A.

Q. I will hand you the instrument marked Plaintiff's Exhibit for identification No. 19 and ask you to identify that, Major Paulson.

A. That is military specification for sustenance kit, emergency, Aircraft, Type D-1, numbered MIL-S-5775A, dated 28 August 1950.

Q. Do you recognize that as being the specification called for in the contracts calling for the D-1 type kit.

A. Yes, sir.

Mr. Aug: I would like to offer this specification in evidence, your Honor, as Plaintiff's Exhibit No. 19.

Mr. Kelley: If the Court please, the defendant Opper enters his objection to the introduction of Exhibit 19 upon the same grounds that were stated as respecting Exhibits 17 and 18.

The Court: That is all right, for the same reasons.

Mr. Svoboda: The defendant Hollifield objects.

The Court: Overruled. The document marked as Exhibit 19 for identification is now admitted in evidence.

Thereupon said specification MIL-S-5775A was admitted in evidence, marked as Plaintiff's Exhibit No. 19.

Q. Handing you Government's Exhibit No. 19, Major Paulson, I will ask you to examine it and state whether there is anything in there with respect to goggles?

A. In paragraph 3.3 which lists the components of the kit, Item No. 11 calls out goggles, sun, Type 1, in accordance with specification MIL-G-4085, 3 pairs per kit.

Q. Are you familiar with that specification MIL-G-4085, Major Paulson?

A. Yes, sir.

The Court: I would like to make an observation in the record for the benefit of counsel, because I think it is an important fact. I would like to have the record show that the court has not, at any time, prevented counsel for defendants or either of them from cross-examining any of these witnesses with respect to the various documents that have heretofore been admitted in evidence, which consists of all the exhibits; excepting I think Exhibit 2 and Exhibit 3, possibly Exhibits 1, 2, 3, 14 and 16 there has been no objection upon the part—no refusal upon the part of the Court to counsel for the defendant examining any of the witnesses that have called or are to be called, with regard to any of these documents, with the right to

renew their objections after such a cross-examination, if counsel wish to have such.

What I have held is that we cannot stop the progress of this case, at least, that has been my view, to have a voir dire examination of the witness as to each and every document that is individually tendered into evidence.

Counsel may have their objection to it, of course, and cross-examine about it. After you have done so, if you feel you have brought out anything in your cross-examination that verifies your objection you certainly have the right to renew it.

I just want the record to show that because of these later objections which are based upon an earlier ruling and I don't want any question made about that earlier ruling in the record.

Mr. Kelley: For the record, if your Honor please, may I on behalf of the defendant Opper state our position?

The Court: Yes, sir, you may.

Mr. Kelley: I realize full well that we should be and probably will be accorded a proper scope and opportunity for cross-examination. Now, as to the witness who was first called to the stand in this case, Mr. Kistner, of course, as yet there has been no opportunity for cross-examination, because he was withdrawn from the stand by the government. As to Mr. Kistner, because he was withdrawn, I had had no opportunity to complete a voir dire examination that I had commenced.

Now, as to the witness who followed Mr. Kistner, Special Agent John DeNeale, it was at the time that he was on the stand in his direct examination, that the government identified and offered in evidence a series of four purchase requests and a series of contracts, the exhibit numbers being Government's 8 through Government's 13. At that time, when they were offered, I on behalf of the defendant Opper requested permission to examine the witness on his voir dire to determine on the voir dire facts that would affect the admissibility of these documents. My

request was categorically denied. The Court announced, incidentally, that the exhibits were to be admitted in evidence. Once so admitted then all the cross-examination in the world would not cure what I feel to have been deprivation of our rights and I thus must take the position that the four purchase requests now admitted in evidence, the contracts just mentioned by exhibit number, were all improperly admitted and that therefore any specifications which must be admitted by virtue of their connection with these documents are likewise objectionable.

The Court: I understand. Of course, I would like the record to show, which is a fact, that all of these records were produced by the parties in charge of them, who were brought in here from the United States Military Base, whatever you call it out here at Wright Field, and that they are all documents that are referred to in the indictment. I think that clears up the record so we all understand.

The record will show whether I am right about this or not. I am not going to dispute the record. It is true that Mr. Kistner was excused. However, that was for him to find out or verify about these documents, Government's Exhibits 2 and 3, which are named in the indictment with the same numbers exactly that appear on the exhibits, except the letter C was added on the exhibits and he was to find out or testify back here at some time with regard to those two documents.

Now I think the record will show, we won't take the time now because it will speak for itself, that opportunity was given to counsel to cross-examine Mr. Kistner about all these documents that were offered in evidence. I am quite sure there was no desire to cut counsel off. I don't know whether any questions were asked him or not.

Mr. Kelley: If your Honor please, the record couldn't show that defendant Opper was offered an opportunity to cross-examine the witness Kistner, because the direct examination—I was offered the right to commence a voir dire

examination of the witness Kistner, which I was not able to complete. In the meantime all the exhibits, save the two, 2 and 3, have been admitted in evidence prior to any return to the stand of Mr. Kistner.

Mr. Richter: Mr. Kistner will be called very shortly.

The Court: All right. I think we have it all straight in the record. The record will speak, of course, for itself and I won't change it.

Mr. Aug: Would you mark that for identification?

The Court: Anyway I want it to be plain, in the view of the Court, I do not want any question made that defendants' counsel were not given full opportunity to cross-examine, because that is a right that they have in this and every other case. It is a very important right and this Court, of course, will not deprive them of that. Be that as it may, you may go forward.

Mr. Aug: Mark it 20.

The Court: What is the date of it?

Mr. Aug: 21 March 1950.

Thereupon a document was marked for identification as Plaintiff's Exhibit No. 20.

Q. I will hand you a document marked for identification as Plaintiff's Exhibit No. 20 and ask you to identify it, Major Paulson.

A. This is military specification MIL-G-4085, dated 21 March 1950, for goggles, folding.

Q. I will ask you to examine again the Exhibit 19 and state whether the Exhibit 20 is the specification referred to in Exhibit No. 19.

A. Yes, sir, it appears to be.

Mr. Aug: We will offer the Government's Exhibit No. 20 in evidence, if the Court please.

Mr. Kelley: The defendant Opper objects to the introduction of Exhibit 20 on the same grounds stated with respect to Exhibits 17, 18 and 19.

The Court: Yes, sir. Very well. It may be admitted.

Thereupon specification MIL-G-4085 was admitted in evidence and marked Plaintiff's Exhibit No. 20.

Mr. Svoboda: If the Court please, I am going to ask at this time, instead of jumping up each time, as to the defendant Hollifield objecting to the same as defendant Opper, I would like to renew again that any objection made would be the same as for the defendant Hollifield.

The Court: Yes. I am sure that is understood, but if not, that is the understanding of the Court and I think of the government that the objection of counsel for either one of these defendants inures to the benefit of the other.

Mr. Svoboda: Thank you.

Mr. Aug: May we speak to the Court?

(Out of the hearing of the jury):

Mr. Aug: It is the government's intention at this time to discontinue the questioning of Major Paulson and proceed with the attempt to clarify the two PRs offered for evidence but which have as yet not been introduced into evidence.

The Court: That is Government's Exhibits 2 and 3.

Mr. Aug: Government's Exhibits 2 and 3. In the event that those exhibits are introduced into evidence, the government would like to reserve the right to recall Major Paulson and interrogate him as to those exhibits and the contracts resulting from them. It is agreed between counsel that the cross-examination of Major Paulson will be withheld until a determination of those conditions.

Mr. Kelley: It is agreed.

The Court: Is that satisfactory?

Mr. Kelley: It is agreed by the defendant Opper.

Mr. Svoboda: And Hollifield.

The Court: Counsel agree to that.

Mr. Kelley: Yes, sir.

Mr. Aug: Then they can have one cross-examination.

(In the hearing of the jury):

Mr. Aug: We are through with the witness at this time. Major Paulson, you may be excused.

And thereupon

JOHN W. WHITE, being duly sworn, testified as follows:

Direct Examination, by Mr. Richter.

Q. Will you state your name, please?
A. John W. White.
Q. Where do you live?
A. Clifton, Ohio.
Q. What is your occupation?
A. Employee at Wright Field.
Q. In what capacity?
A. Administrative executive.
Q. Now, in that capacity, do you have charge of records and of forms?
A. Yes, sir.
Q. I will hand you Government's Exhibits 2 and 3 and direct your attention—

Mr. Kelley: May I interrupt? Will counsel please recite they are for identification?

Q. (Continued) —marked for identification Government's Exhibits 2 and 3, and direct your attention to the numbers in the upper righthand corners and ask you to

explain to the jury and the Court the significance of the letter C which appears after those numbers?

Mr. Kelley: I object, if the Court please. There is no proper foundation laid for this question. He hasn't determined from the witness if he could explain it and why he could explain it.

Q. Can you explain it?
A. Yes, sir.

The Court: Do these matters come up under your official province?

The Witness: Yes, sir.

Mr. Aug: I thought we had brought that out by explaining his duties as being in charge of records and forms.

Mr. Kelley: If the Court please, I again request, certainly I do not wish to unnecessarily take the time of this Court and jury,—may I request a brief voir dire at this point?

The Court: Yes, you may.

By Mr. Kelley:

Q. Witness, have you ever before being brought in connection with this case in any way seen any of those documents?

A. No. My assistant signed them, however, when they came in.

Q. My question was, have you ever seen either of them before?

A. Not to my knowledge.

Q. You have no personal knowledge as respects the contents of either of those documents?

A. Yes, I have.

Q. You have a personal knowledge as to their contents?

A. I have a personal knowledge of the contents of all documents of this kind. They pass under my control, not visibly under my eyes, but my assistant's.

Q. Do you mean to say you have a knowledge of their contents or a knowledge of the nature of their contents?

A. Well, I had a fair knowledge of the program, of everything we buy, since it passes through my office.

Q. Since you have never before seen either of these documents, what basis permits you to explain something that is on them?

A. The question of the letter C was placed on all PRs on my instructions.

Q. Are you sure that that is true?

A. Yes, sir.

Mr. Kelley: May I see the other PRs please?

Q. Witness, I show you what has been marked in evidence Government's Exhibit 5. Do you see—First, what is that? Is that a PR?

A. That is a PR.

Q. Is there a letter C on it?

The Court: By "PR" you mean—

The Witness: Purchase request.

Q. Is there a letter C on it?

A. No.

Q. How do you reconcile that fact, if you instructed the letter C to be placed on all purchase requests?

A. The purchase request form we order through the Adjutant General at AMC, that is, the production of this blank form, such as I hold in my hand. They make them in pads of 25 units, of an original and three copies. About a year and a half ago or maybe a little longer, the Adjutant General's office reproduced 15,000 PRs, originals and copies. In some manner a slip up was made and they printed 15,000 duplicates from 120,000 to 135,000. Now, they were already printed and in the hands of Supply and Maintenance Division. My office received all PRs from all divisions for scrutiny and coordination, with budget and other necessary check points before delivering them to

the buyer. My people reported to me that they were getting duplicate numbers. So, I called the Adjutant General's office and ascertained the fact that they made the mistake and also ascertained the fact that the PRs were in the hands of Supply and Maintenance Division in Area A. So I contacted the chief of that division and I worked out with his control office the idea that we would not destroy these things, because they were already printed. And since during the war we used an A and a B, we decided to use a C. So, on all the series between 120,000 and 135,000 used by Supply and Maintenance Division they were to attach the letter C to the number. The Procurement Division, Engineering Division, Intelligence and other divisions used whatever pads they had, without affixing a C. Therefore, we did not have a duplication beyond probably 25 of the originals that came in while my office was catching the duplication.

Q. But there were at least 25 duplications; is that right?

A. They were sent back for change.

Q. Could you answer that question?

A. Yes, there were.

Q. That is all I asked. Am I correct in understanding when they complained to you of a duplication they would discover a situation such as this, that a purchase request had been issued and filled out as respects an item, let's say A—

A. That is right.

Q. And a different item, let's say B, was filled out on another purchase request, each request bearing the selfsame number?

A. That is right.

Q. And to your knowledge, at least 25 instances of that character?

A. 20 to 25.

Q. 20 to 25. Do you know precisely how many?

A. No, I don't. I wouldn't know that.

Q. You couldn't know that, could you?

A. No.

Q. And thus to avoid a repetition of that error, after errors had existed, you directed after that thenceforth they place a C?

A. And I also directed that we go back and retrieve duplications.

Q. Didn't you state a moment ago that it would have been impossible for you to determine all duplications?

A. I didn't say that.

The Court: What did you say?

The Witness: We kept a pencil record by number of who gets a PR.

Q. Did you personally go back in this instance to determine whether or not, as respects Government's Exhibit for identification 2 that there was in fact a duplication?

A. I don't think there was a duplication of this one.

Q. Why do you say that?

A. Because it came in with this C on it.

Q. How do you know that?

A. My girl signed it, my chief girl signed it and she wouldn't have signed it.

Q. Do you realize you are testifying under oath?

Mr. Richter: The witness should be given the chance to answer the question.

The Court: Answer the question.

A. This thing is dated to January 1951. This occurrence of the error was detected in, I believe, some time in July or August 1950.

Q. You don't know that of your own knowledge, do you?

A. I know that, yes.

Q. Of your own knowledge, when this error was detected as to the documents before you?

A. The documents before me are long after the error was detected.

Q. A moment ago you told me with respect to the document you have before you, which is Government's Exhibit 2 for identification, you told this Court and this jury that

the C that appears thereon was on it when it came to your office. Is that right? Did you state that?

A. I stated that because I predicate my statement on the fact that a member of my staff accepted it and signed it and they were instructed not to unless it had the C on it.

Q. Then you are indulging in a supposition, are you not?

A. Well,—

Q. Are you or aren't you, sir?

A. Well, yes, technically, I suppose so.

Q. And do we understand that you undertake now to suggest that on Government's Exhibits 2 and 3 for identification that duplications were found to exist as to those numbers?

A. On these numbers.

Q. That someone went back and avoided a duplication by inserting a C on two duplicates, therefore, we have no duplication here; is that correct?

A. This duplication here, sir, may I call your attention to this fact that I signed this one?

Q. What is the number of that exhibit?

A. This is 119,443.

Q. What is the exhibit number? You don't need to look for it.

The Court: It is No. 5.

The Witness: 5.

Q. You signed this?

A. I signed that one myself, because it came out of procurement on the 27th of August 1950.

Q. So, you have particular knowledge as to No. 5?

A. That is right and there was apparently no duplication at that time.

Q. Why do you say "apparently"?

A. Because this one was not.

Q. You are talking about—

A. Exhibit No. 2 was dated January 1951, six months later, or five months later.

Q. You say you have personal knowledge with respect to 5?

A. That is right.

Q. You do not have personal knowledge with respect to 2 and 3, but must rely on supposition; is that right?

A. Well, supposition or shall we say operation.

Q. What do you say?

A. Well, I will say that my people have been found to be 99 per cent correct in their work.

Q. So they can be incorrect one per cent of the time; is that right?

A. Possibly so. This incidentally, your Exhibit No. 3 was dated 3 December 1950.

Mr. Kelley: Defendant Opper objects to the introduction of the document tendered on the ground that the witness has not been proved qualified to identify it and that the instrument stands at this moment unidentified and unconnected with the indictment in this case.

The Court: Are these under your supervision?

The Witness: Yes, sir.

The Court: At Wright Field?

The Witness: Yes, sir.

The Court: Objection overruled. Government's Exhibits 2 and 3 for identification are now admitted in evidence and may be treated as evidence in the case.

Thereupon said documents were admitted in evidence and marked as Plaintiff's Exhibits Nos. 2 and 3 respectively.

Mr. Richter: Mr. White, you may be excused.

The Court: Pardon me. Are you through with the witness?

Mr. Aug: One moment, your Honor.

Mr. Richter: If the Court please, we would like it stipulated that all of the testimony given by this witness on the voir dire is the same testimony that would have been produced by the government on direct examination of the witness for the purpose of introducing the documents.

Mr. Kelley: If the Court please, I don't know what that statement was. He says he would like to stipulate it. Is he testifying?

The Court: I will not agree to the stipulation. You go ahead and ask him all these questions over again. Go ahead.

By Mr. Richter:

Q. Do you know, Mr. White, in what unit or division Government's Exhibits 2 and 3 originated?

A. Supply Division.

Q. Now how did you first undertake—under what circumstances did you undertake to direct that the letter C should be added to the numbers which were duplicates on the forms?

A. I established the fact first that the duplicates had been made and distributed through the Adjutant General's office. Then I contacted the initiating agencies who it had been reported to me had the blank forms. With that division or divisions, I then arranged with them that they would add C to the number before releasing their purchase requests, after they had been initiated.

Q. Will you state whether or not you issued instructions—

A. I did, sir.

Q. —to Supply Division?

A. I did, sir.

Q. And other departments to that effect?

A. I did, sir. Then I instructed my own people to reject PRs coming from those divisions in that number range that did not have C after the numbers.

Q. Now, Mr. White, what was the range of numbers

that were involved in these duplications? Will you repeat that please?

A. 120,000 to 135,000, inclusive.

Q. Now, this is Government's Exhibit No. 5, which counsel for the defendant Opper questioned you about. What is that number?

A. That number is 119,443.

Q. Will you state whether or not that is within the range of the numbers which were duplicated?

A. It is within the range. No, it isn't.

Q. I will hand you Government's Exhibits 2 and 3 and ask you whether or not they are within the range of the numbers which were duplicated?

A. They are.

Mr. Richter: Now, if the Court please, we offer these in evidence.

The Court: Very well. They have been objected to. The objection still stands.

Mr. Kelley: We object to them, of course, on the other grounds stated as to all purchase requests, all grounds of objection which we have directed toward any of the six purchase requests we wish to bear upon this particular objection.

The Court: That is all right. Overrule the objection on Exhibits 2 and 3 being admitted into evidence.

Thereupon said documents were admitted in evidence and marked as Plaintiff's Exhibits Nos. 2 and 3, respectively.

Mr. Aug: We are through with Mr. White.

The Court: No, don't go away. Stay here, please. (After the Court and counsel confer at the bench out of the hearing of the jury:) Now is there anything further the government wishes to inquire of the witness, Mr. White?

Mr. Richter: No.

The Court: Now, does counsel wish to cross-examine Mr. White?

Mr. Kelley: None as to the defendant Opper.

Mr. Svoboda: None as to defendant Hollifield.

The Court: No cross-examination.

Mr. Kelley: No, sir.

Mr. Svoboda: No, sir.

The Court: Now you can go, Mr. White.

Mr. Richter: If the Court please, the government is through with the witness Kistner. However, if counsel for defendants desire to cross-examine him, they may have that opportunity.

The Court: That is right. Call Mr. Kistner.

And thereupon

JEROME KISTNER resumed the witness stand and testified further as follows:

The Court: Does the government wish to ask anything further of Mr. Kistner?

Mr. Richter: The government has no further questions of Mr. Kistner. Counsel may proceed to cross-examine him.

Mr. Kelley: It was my understanding, if the Court please, that this witness was recalled solely with respect to Government Exhibits 2 and 3. That was so stated, I believe in the record. Since those exhibits as well as all other contracts and purchase requests have been received in evidence prior to his recall and tender for cross-examination, we will not cross-examine.

The Court: Do you wish to cross-examine him? I want the record to show that the Court now says counsel for

the defendants, Mr. Kistner is here, they may cross-examine him as fully as they wish, not only about Exhibits 2 and 3 but 4, 5, 6, 7 and 8 to 13, inclusive, if they wish to cross-examine him about these exhibits, or any of these other exhibits down to 19 or 20, inclusive, although, I think 20 is still marked for identification.

Mr. Kelley: No.

The Court: Is it admitted? If counsel develops anything in their cross-examination which justifies the Court in reversing his ruling heretofore made, I shall certainly reverse it, but I am not going to reverse it unless counsel develop something that supplies some basis for it. Now you may proceed with cross-examination, Gentlemen, or not, as you see fi

Mr. Kelley: We will stand on the record as made with no further cross-examination, your Honor.

The Court: That is quite satisfactory.

Mr. Kelley: You may be excused.

The Court: That is all, then, Mr. Kistner. Call the next witness.

And thereupon

MAJOR ROBERT M. PAULSON resumed the witness stand and testified further on **Direct Examination**, as follows:

By Mr. Aug:

Q. Major Paulson, I will hand you Government's Exhibit No. 2 and ask you—which is purchase request 127,196-C and ask you basically what that purchase request calls for?

A. This purchase request calls for 13,000 each kit, emergency, sustenance, cold climate, seat style, Type B-1, in accordance with spec. MIL-S-6226A, dated 24 January 1951 and Exhibit MCREXD5-45, dated 30 August 1950 and Exhibit MCREXD5-43, dated 28 August 1950.

Q. Will you examine that exhibit and tell the jury whether that purchase request resulted in any contract or contracts?

A. This purchase request resulted in four contracts, Contract AF 26635 with Dough Boy Industries, Inc., New Richmond, Wisconsin; Contract 26634 with Cappel-MacDonald Company, Dayton, Ohio; Contract 26853 with Manufacturers Research and Development Corporation, Washington, D. C., and Contract AF 29060 with Sav-Way Sera Seal, Incorporated, Detroit, Michigan.

Q. Major, I will hand you Government's Exhibit No. 3, which is purchase request No. 133709-C and ask you to state basically what that purchase request calls for?

A. 10,000 each kits, emergency, sustenance, temperate climate, seat style, Type C-1, in accordance with Spec. MIL-S-6227A, dated 24 January 1951.

Q. Major Paulson, will you examine that exhibit and state whether or not that purchase request resulted in any contracts?

A. Resulted in two contracts, Contract AF 26634 with Cappel-MacDonald & Company, Dayton, Ohio and Contract AF 26854 with General American Transportation Corporation, Chicago, Illinois.

Q. Now, Major Paulson, I will hand you Government's Exhibit No. 12, which is contract 26634 and ask you what that contract calls for.

A. This contract calls for two items, Item 1, 2000 emergency, sustenance kit, cold climate, seat style, Type B-1, in accordance with military specification MIL-S-6226A, dated 24 January 1951.

Q. I will ask you to examine that exhibit and see if there is anything on there which indicates which purchase request that contract resulted from?

A. There is one other item on here.

Q. Very well.

A. Item 2, 10,000 kits, emergency, sustenance, temperate climate, seat style, type C-1, in accordance with Spec. MIL-S-6227A, dated 24 January 1951.

Q. Would you answer the next question put to you, which was to the effect, is there anything on that contract which indicates which purchase request that contract resulted from?

A. Yes. This contract resulted from purchase request 133,709-C.

Q. Is that one of the purchase requests which you have in your hand?

A. Yes, it is.

Q. Will you tell us what the exhibit number of that document is?

A. Exhibit No. 3.

Mr. Aug: We are through with this witness, if the Court please.

Cross-Examination, by Mr. Kelley.

Q. I only have one or two questions, Major. Would you restate for me your title or the description of your position at the Field?

A. At the present time?

Q. At the present time.

A. I am Chief of the Aerial Reconnaissance Unit, Armament Section, Electronics Branch, Procurement Division.

Q. The largest element that you have mentioned is the Procurement Division, is that right?

A. That is right.

Q. The others are branches down from that division. When did you undertake those duties and functions?

A. Approximately the 1st of March of this year.

Q. Of 1952?

A. 1952.

Q. What was your duty and function and title prior to that date?

A. From approximately the 1st of July 1951 to the 17th of January 1952, I was chief of the survival equipment unit of the Materiel Branch, of the Materiel Section, Procurement Division.

Q. And located where?

A. In building 16-B, Room 214.

Q. And prior to that were you at the Field in some other capacity?

A. Yes. Prior to that time I was Chief of the Chemicals Unit of the Materiel Branch of the Materiel Section, Procurement Division.

Mr. Kelley: Just a moment, please. (After conferring with co-counsel) Your Honor, we make no request to recall this witness for further cross-examination, but may it be understood that he will not leave the jurisdiction of this Court while this trial continues?

The Court: Well, to the extent that the Court is able to control that.

Mr. Kelley: It was a request only.

The Court: I suppose if he gets a request from General Eisenhower--

The Witness: I already have that order, your Honor.

The Court: Already have an order to go to Paris?

The Witness: No, to Texas.

The Court: Oh, to Texas. That is better yet. How soon do you have to go?

The Witness: The estimated departure date will be around the 1st of June of this year.

Mr. Kelley: I trust we will be through by that time.

The Court: We ought to be approximately near the end of the trial by the 1st of June.

Mr. Aug: I hope so.

The Court: We will have this arrangement: Please don't go away. If you get military orders, I don't suppose I have any right to interfere with it. I won't take any chance anyhow. But if you should go away, please notify the District Attorney's Office or counsel for defendants. I only

said District Attorney's office, because it is a little easier to get them. Let them know so there won't be any question about that. You have the right to recall him if you wish to.

Mr. Kelley: Thank you, your Honor.

The Court: You are excused, subject to coming back. I think it would be well to understand, the District Attorney's office to understand, you Gentlemen should understand, if we reach the conclusion of the case and counsel are not going to recall the Major, I think you should get some word to him too.

Mr. Aug: Your Honor, I am not clear what the purpose of the recalling would be. Are they through with the cross-examination of this witness? The purpose could be to recall this witness as their witness.

The Court: No. They can recall him for cross-examination, if they have something they would like to look into, these papers and all. I think they have the right to do that. I wouldn't prevent them the right to cross-examine him. You should let him know if he is finished.

Mr. Aug: I would think any right to cross-examine they would have, would have to be exercised before the final termination of our particular branch of the case.

The Court: I think that is right. I think counsel will agree to that. That is correct, is it not?

Mr. Kelley: Yes, your Honor, with the added thought we would still appreciate it if the witness would remain in the jurisdiction, or notify us if he receives orders during the period that the defendant is establishing its case.

The Court: The Major is subject to recall if counsel want to recall him for cross-examination. However, any cross-examination would have to be while the government is still on their side of the case. However, if it is after that, during the course of defendants' case, he would be called for direct examination.

Mr. Canny: May we have a five-minute break at this time?

The Court: Recess?

Mr. Canny: Yes, your Honor.

The Court: Yes. I guess you are excused temporarily.

The Witness: Thank you.

Thereupon a short recess was had.

And thereupon

CHESTER BUCHSBAUM, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. State your full name.

A. Chester Buchsbaum. I am president of S. Buchsbaum & Company, Chicago.

Q. Is your home in Chicago?

A. My home is in Chicago.

Q. Mr. Buchsbaum, do you know the defendant Robert Hollifield?

A. I do.

Q. Do you see him in this court room?

A. I see him over there, third man at the rear, one, two, three.

Q. Do you know the defendant William J. Opper?

A. I do.

Q. Do you see him in this court room?

A. In the back of the table there, one, two, three, four, fourth man.

Mr. Aug: Can the record state that the witness has pointed to the defendants Hollifield and Opper?

The Court: Yes.

Q. When did you first know Robert Hollifield, Mr. Buchsbaum?

A. I met Robert Hollifield during the World War, sometime during the last world war, in some division. I don't remember where, and then later I didn't see him for around five or six years and I met him at Wright Field in the Aero Med. Lab.

Q. What year would this be?

A. 1950, I think in September.

Q. And when did you first meet the defendant Opper?

A. I met Mr. Opper the early part of October, probably the first week of October.

Q. Where did you first meet him and what year?

A. 1950, I met him at my office.

Q. In Chicago?

A. In Chicago. I spoke to him on the 'phone first.

Q. Will you tell the jury the circumstances around your meeting Mr. Opper?

A. When I went to Wright Field to see Mr. Hollifield, I was working on bidding on the E-1 kit.

Q. Can you describe the E-1 kit? Can you tell us generally what you mean by the E-1 kit?

A. It is a sustenance kit and it has a raincoat in it and a carrying case; has goggles, machette, and various life-saving equipment for use—other equipment for life-saving. We manufacture a considerable amount of merchandise that would go into that kit, such as the raincoat and the outside container, and I wanted to see all the merchandise that goes into it so I could bid on the item. Mr. Hollifield showed me all the merchandise and then we went back. That was in a room across the hall from Mr. Hollifield's office and we went back into Mr. Hollifield's office and I reviewed with him the various items and asked him where certain items could be obtained. There was a compass and I asked him where I could get the compass and he says, "The compass, there is a man in Chicago has that, by the name of Opper." I said: "Well, do you know how to reach him?" He says, "I don't know anything about it except his name is Opper and he is in Chicago." So, I put the name down in my pocket along with the other various names.

Q. Was that the first mention you ever heard of Opper?

A. First time I ever heard of Opper.

Q. What time of year was this?

A. Late in September.

Q. And what year?

A. 1950.

Q. Now, what did you do after this visit to Wright Field?

A. Went back home; went over all my records and had my engineers write letters to the various people, requesting prices on the various merchandise that was required, also sent my engineers to Wright Field to work on the raincoat and other things we make to see how they were made, so we could figure on costs ourselves of those items.

Q. Did you see Opper after you returned to Chicago?

A. Not immediately. We wrote them a letter—our firm wrote them a letter. Then we called him. I had to check his 'phone number myself. I called him myself. There was a few Oppers in the book and I finally located the correct Opper. He says, "I got your letter and I will come over and I will see you" and he came over to see me.

Q. When was this?

A. That I believe was the first few days in October of 1950.

Q. Tell the jury what transpired then?

A. He came over and showed me the little compass; left me a few samples and left me a few samples of some other little compass he made, a very small compass. I had the bids laying on my desk. I said: "I have to get some other items. There are some other items I need now" and I went over the list and the list had on it this particular item was a ski goggle and had the spec. number which I forget at this moment and type 1, I think it was. He says, "I think I know where to get some of those." I says, "I am having a hard time getting a price." We were having a very difficult time; no one wanted to make them. The order required 14,200 of them. I think 14,200. It was very hard to get a price. The American Optical did not want

to make them at this time. We later did get a price of, I think $8.50 or thereabouts. He says, "I think I can get some of those for you." I says, "Get them in. Let's see what they look like." Also I was working on a D-1 kit. The D-1 kit is a smaller sustenance kit, which contained in addition to various products a sun glass, a plastic sun glass, or anti-glare glass and he said: "I think I can get some of those too." I says, "Get me the samples and we will see what can be done" and he left my office and a few days later—I am trying to correlate the date by the time I put the bid in. I would say about October 11, about that time, 11th or 12th.

Q. You submitted a bid to the government at that time?

A. No. I submitted the E-1 kit I think on the 13th and it was the day before the 11th he came in and brought me the glasses, the ski glasses and the anti-glare glasses, the plastic glasses with leather binding.

Q. Then you say you later submitted a bid on the E-1 kit?

A. I submitted the E-1, I think, on the 13th of June.

Q. Now, in the E-1 kit was a goggle part of that kit?

A. The ski goggle was a part of the kit.

Q. Excuse me. Do you say you submitted your bid on the 13th? What month was that?

A. October 1950.

Q. On the E-1 kit?

A. On the E-1 kit.

Q. When did you submit the bid on the E-1 kit?

The Court: You can look at your record.

A. I don't think I have that in my case. It was either the 9th or 13th. I think it was the 13th, Friday. October 13th was Friday. That was the date I submitted the bid. It was supposed to be in on the 9th. It was extended to the 13th.

Q. It was in October?

A. October 1950.

Q. In that E-1 kit was a goggle to be furnished in that E-1 kit?

A. The ski goggle was to be furnished in that kit.

Q. When you submitted your bid on the E-1 kit, did you list Opper as the supplier of that goggle?

A. When I submitted my bid I originally made up the bid with the American Optical price of $8.50 or thereabouts.

Q. Their bid was in on the—

A. No. Then I put an alternate in that I subsequently had written up on the day that the Air Force told me that the war surplus goggle would be satisfactory. I put a little rider into my bid stating that the bid price would be reduced providing they used the war surplus item and the war surplus item would cost me $1.40.

Q. Do you recall the date of that rider, as you call it?

A. The rider was attached to the bid, the same date I put it in, October 13th.

Mr. Kelley: May I interrupt? I am not making an objection. The government has these dates in their possession. They are right here. The bid is here.

The Court: Yes. They may have it in some memorandum.

The Witness: I haven't the memorandums. I tried to study these bids before I left Chicago. It was either the 9th or 13th. Those are the only two days I have confused.

Mr. Aug: Your Honor, we are just developing the circumstances. We are not interested in introducing the E-1 bid. The E-1 bid had never become a contract so we have no purpose to be served by introducing the instrument itself.

Mr. Kelley: They have already gone into it and testified to its contents. We are very much interested in going into it.

Mr. Aug: We don't want to go into it.

The Witness: I didn't receive a bid—I didn't receive the order on that. My price was too high. I wasn't given the order, so I haven't—I didn't bring my records on that particular bid.

Mr. Kelley: Once the government has on its direct examination gone into his bid and into the contents of his bid, as to whether it was surplus, may I request that document be produced.

Mr. Aug: No, we haven't. We asked about whether it was produced or—

Mr. Kelley: They have asked him about his bid. It is in their case.

Mr. Aug: We have asked him if Opper was the proposed supplier in the E-1 kit.

Mr. Kelley: For the last five minutes, this Gentleman in response to questions of government attorney has said he filed a bid on the E-1 kit. They asked him what date it was. He said the 13th of October. He said: "What did you put in there?" He said: "I put in a rider." They have the document and they are reluctant to produce it.

Mr. Aug: No, we are not reluctant to produce it. I am saying I don't know whether we have it. If we have the E-1 we will introduce it.

The Court: Each side try your case as you think it should be tried. I do not expect the defendant to tell the government how to try their case and I do not expect the government to tell the defendant how to try their case. If you wish to introduce something, you may on either side, if it is proper and if you do not, you don't have to. There isn't anything pending before the Court.

Mr. Aug: I would like to continue with this witness, your Honor, and if we can find the E-1 kit, it will be offered in evidence. In the meantime I would like to continue with the witness in the interest of expediting the trial.

The Court: You may proceed. There is nothing before the Court right now that I know of.

Q. Now, Mr. Buchsbaum, did you submit a bid on the D-1 kit?

A. I did.

Q. And do you recall the approximate date of submitting that bid?

A. It was later than the 13th. I am confused on the date. A little bit later. I wish you would help me on that date.

Mr. Aug: Mark this for identification as Exhibit 21.

Thereupon a document was marked for identification as Plaintiff's Exhibit No. 21.

Q. Mr. Buchsbaum, I will hand you an instrument marked Plaintiff's Exhibit 21 for identification and ask you if you can tell us what that document is.

A. That is a bid form calling for the D-1 kit and includes my bid, and that was requested to be in the government office on October 19th. It was made out October 18th, therefore, it was personally delivered. I personally delivered it to the Air Force on the 19th. My brother signed it as treasurer. That is his signature.

Q. The signature on this document is Emanuel V. Buchsbaum. Can you identify that signature?

A. Yes, I can.

Q. Who is that?

A. He is the treasurer and my brother.

Q. What is the name?

A. Emanuel V. Buchsbaum.

Mr. Aug: We would like to offer Plaintiff's Exhibit No. 21 into evidence, if the Court please.

Mr. Kelley: No objection.

The Court: It may be admitted, marked Government's Exhibit No. 21.

Thereupon said bid on the D-1 kit was admitted in evidence and marked as Plaintiff's Exhibit No. 21.

Q. Mr. Buchsbaum, will you examine Exhibit No. 21 and see if you find theron a list of sub-contractors which was furnished along with the bid?

A. I find a list here.

Q. Who is your sub-contractor with respect to the furnishing of goggles?

A. Mr. Opper. It says "William Opper, Chicago, Illinois, Goggles, Sun Type, three to a kit, 7500."

Q. Now, Mr. Buchsbaum, I will hand you Government's Exhibit No. 8, which is contract No. 17438 between the Department of the Air Force and the S. Buchsbaum Company. Are you familiar with that contract, sir?

A. I am.

Q. Will you tell the jury what that contract is basically for?

A. Sustenance kits, D-1. And the quantity on that one—I don't see the quantity. I think this was for 2500. I don't see the quantity on this one.

Q. But it is the contract between you and the government?

A. It is the contract between the government and my firm for 2500 emergency kits, D-1, that's right.

Q. What is the date of that contract, sir?

A. The contract was approved January 6, 1951. It was signed by me before that because it comes in to me earlier. I am trying to see when it was—when it came in to me originally. It doesn't seem to have the original date.

Q. Let me see it.

A. (Witness hands document to counsel.)

Q. I will ask you to look at the second page of the contract and see if there isn't a date on that.

A. 16th of November and in all probability I received that within five or six days after that date. That would make it around the 22nd or thereabouts of November that I would receive it or sign it and it doesn't become a contract until I return it to Wright Field and it comes back properly signed from the Air Force.

Q. That November 16th date you are referring to, what was the year?

A. 1950.

Q. Have you been complying with the terms of that contract?

Mr. Kelley: I object. It calls for a conclusion, a contract of 18 pages.

Q. How many survival kits were to be supplied?

A. 2500 on this original contract, which was subsequently increased fifty per cent, to 3750.

Q. Have you supplied the survival kits called for by that contract?

A. I have. This has been completed.

Q. In the survival kits furnished on that contract were there goggles in the survival kits?

A. There were three goggles to each kit.

Q. Who supplied those goggles to you?

A. Mr. William Opper.

Q. Mr. Buchsbaum, I will hand you Government's Exhibit No. 9, which is contract 18136, between your company and the Air Force. Will you state what that contract calls for?

A. It is a very similar contract to the first one and calls for 2500 D-1 kits that was awarded to our company on an invitation for bid, informal invitation for bid, competitive bid, calling for 2500. An option calls for fifty per cent increase, which was subsequently increased to 3750 total. This contract has been completed.

Mr. Kelley: May I ask the number of that?

Mr. Aug: This is No. 9.

Mr. Kelley: Number of items.

Q. How many items does it call for?

A. 2500 kits increased before completion to 3750 total, three goggles to a kit.

Q. And the kits referred to in that contract, have you supplied those to the government?

A. The order has been completed.

Q. In those kits are there any goggles?

A. Three goggles to a kit.

Q. From whom did you get those goggles?

A. From William Opper, Chicago.

The Court: We better stop now. I suggest, if it is agreeable, that we recess now until 2 o'clock. Come back please, Mr. Buchsbaum.

Members of the Jury, we are about to recess the further hearing of this cause until 2 o'clock this afternoon. Bear in mind the usual admonition.

Adjourn, if you please, until 2 o'clock

Thereupon the further proceedings in the trial of this cause were adjourned until 2 o'clock of the afternoon of the same day.

Afternoon Session.

Wednesday, May 14, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

CHESTER BUCHSBAUM resumed the witness stand and testified further on **direct examination**, as follows:

By Mr. Aug.

Q. Mr. Buchsbaum, I will hand you Government's Exhibit No. 11, which is contract No. 26641 between your company and the Air Force. I will ask you to state in substance what that contract calls for.

A. This contract calls for D-1 kits to the extent of 6000. It is a sustenance kit for the Air Force.

Q. Now, do you know, of your own knowledge, whether goggles are a part of that kit?

A. Sun goggles are a part of this kit.

Q. Can you tell the jury whether you have supplied the kits called for in that contract?

A. No. This contract is in work. We have shipped a small part of it. We anticipate completing it in July of this year.

Q. Now, in the survival kits, or in the kits that have been supplied to the government is a goggle a component of that kit?

A. Three goggles in every kit.

Q. Where did you get the goggles that went into the kit?

A. From William Opper, Chicago.

Q. Have you ever gotten goggles from any other supplier?

A. Never bought any goggles for the government to be supplied to the government from any other supplier. I have purchased goggles for our wholesale division. We have various goggles and sun glasses in our catalog.

Q. Let me ask you this: With respect to contract No. 17438 and contract 18136 and contract 26641, have there ever been any goggles that went into those kits that was provided by any man other than Opper?

A. No one else except Opper.

Mr. Aug: Mark these for identification 22, 23 and 24.

Thereupon several documents were marked for identification as Plaintiff's Exhibits Nos. 22, 23 and 24, respectively.

Q. Mr. Buchsbaum, I will hand you Plaintiff's Exhibit marked for identification as No. 22 and ask you if you identify that exhibit.

A. It is my letter.

Q. Will you state what it is?

A. I requested permission—

Q. Will you just identify what the nature of the instrument is?

A. It is in reference to contract 18136, requesting permission to use certain merchandise in my contract.

Q. Who is the author of the letter?

A. I wrote the letter, dictated it and wrote the letter and signed the letter—dictated and signed it.

Q. What is the date of the letter?

A. January 8, 1951.

Q. And with what contract is it referred?

A. With the kit contract 18136.

Mr. Aug: Your Honor, I would like to offer in evidence, Government's Exhibit No. 22.

Mr. Kelley: No objection.

The Court: It may be admitted in evidence.

Thereupon said letter was admitted in evidence and marked as Plaintiff's Exhibit No. 22.

Q. I will hand you Government's Exhibit 22 and ask you to read it to the jury, please.

A. (Reads) "In the manufacturing and assembly of the D-1 kits, we ask permission to use the following merchandise which is guaranteed to meet all government specifications and is in first class condition, which of course will be subject to the inspection of the Air Force Inspector.

"Item No. 9 File Flat Smooth, one only required to each kit. File to be the same as the attached sample. We want approval as to whether or not this file is satisfactory as to the word 'smooth'.

"Item No. 11 Sun Goggles, Type 1, 3 pair of goggles to each kit. We ask permission to use sun goggles as per the attached samples that have been made in accordance with specifications 74-G-76-35 and 74-G-76-38.

"Item No. 13 Sun Hat, Reversible, 3 hats required to each kit. Sun hats that have been made in accordance with specification 44-G5062, O. D. on one side, yellow on the other. See attached sample.

"Item No. 32 Whistle Police, Plastic, 1 only whistle to each kit. We ask permission to use whistle as per attached sample, which has been manufactured in accordance with U. S. Navy specifications. Each whistle comes complete with a chain attachment.

"The above materials will be furnished on this contract without additional cost or without any change in the contract price.

"Thanking you for advising us further concerning this matter, we are Yours very truly, S. Buchsbaum & Co., Chester Buchsbaum, President."

Q. I will hand you Plaintiff's Exhibit 23 marked for identification and ask you to state what that document is.

A. This letter was written January 28th. It is the same letter as the letter I just read, except—

Q. Take another look at that date, Mr. Buchsbaum.

A. January 8, 1951. Same letter as I have just read, except it refers to contract 17438, which is the second contract.

Q. Is that your signature on that letter?

A. That is my signature.

Q. And the contents of the letter the same as the letter you just read to the jury?

A. It is identical.

Mr. Aug: We would like to offer this in evidence, your Honor.

Mr. Kelley: No objection.

The Court: Very well. It is admitted in evidence.

Thereupon said letter was admitted in evidence and marked as Plaintiff's Exhibit No. 23.

Q. Mr. Buchsbaum, did you ever receive any reply to your letters of January 8, 1951?

A. I did.

Q. Did you receive any approval which was requested with respect to the goggles?

A. I received an approval.

Q. Mr. Buchsbaum, I will hand you the instrument marked Plaintiff's Exhibit 24 for identification and ask you to tell the jury what that exhibit is?

A. This letter is written to my firm, dated February

12, 1951, subject, contracts 17438 and 18136, and it says,— Want me to read it?

Q. No. This letter was received by you in response to your letters of January 8th; is that correct?

A. In response—It doesn't state.

Q. Is that the only communication you had?

A. The only written communication I had with Wright Field or the contracting office was my letter of January 8th, so this must be in reply to my January 8th letter.

Mr. Aug: Your Honor, we would like to introduce Plaintiff's Exhibit No. 24 in evidence.

Mr. Kelley: No objection.

The Court: All right. It is admitted in evidence.

Thereupon said letter was admitted in evidence and marked as Plaintiff's Exhibit No. 24.

Q. Mr. Buchsbaum, will you state the date on that letter?

A. February 12, 1951.

Q. Will you read the contents of the letter to the jury?

A. (Reads) "The following list of samples submitted for approval as components of the D-1 Survival Kit, are hereby approved: a. File, Flat, Smooth, 6-inch. b. Goggle, Sun, Type 1. c. Hat, Sun, Reversible. d. Whistle, Police, Plastic

"Any samples that were submitted for approval not covered here will be forthcoming upon receipt of same from the Aero Medical Laboratory. (Signed) Robert E. Adams, Contracting Officer."

Q. Is there any reference to the contract numbers in that letter?

A. Yes. It refers to contract 17438 and 18136.

Q. Mr. Buchsbaum, in your letter of January 8th, which is Plaintiff's Exhibit 22 and 23, you refer in there, "Item No. 11, Sun Goggles, Type 1, 3 pair of goggles to each kit. We ask permission to use Sun Goggles as per the attached samples that have been made in accordance with

"certain specifications." Do you know of your own knowledge whether those goggles accompanied the letter?

A. They did. I carried that letter in with the samples of all articles.

Q. You personally took this letter and the samples?

A. I brought the samples along and brought them in to—at that time, the negotiator was Captain Mitchell.

Q. Who did you turn the goggles over to?

A. I am a bit hazy on that. I believe that Captain Mitchell had me bring them over to the lab., the Aero Med. Lab., with a duplicate copy of this letter. We generally write two to three copies of a letter and I brought over one copy and I brought them over to the lab. and delivered them to the lab.

Q. To anybody in particular in the lab.?

A. I don't remember if I gave—to whom I gave them. There are several men in the lab. I don't remember the name.

Q. Do you recall who was present in the lab.?

A. At that time, I don't.

Mr. Aug: We are through with the witness, your Honor.

Cross-Examination, by Mr. Kelley.

Q. Mr. Buchsbaum, so that I get, and in turn the Court and jury will get the straight of it, do I understand that in the month of October 1950 you on behalf of your company submitted, that is to say filed bids with the Air Force, at Wright Field, first as respects a contract for the assembly and delivery to the government of a kit known as a D-1?

A. I did, yes, sir.

Q. And at or about that same time you also submitted a bid on behalf of your company for the assembly and the delivery to the government of a kit known as an E-1 kit?

A. Yes.

Q. If I recall your testimony you stated that you filed your bid as to the E-1 kit on the 13th of October 1950?

A. That is right.

Q. If I recall your testimony correctly you stated that you filed your bid on the D-1 kit on or about the 19th of October?

A. Right.

Q. Now, sir, I right in understanding that you were unsuccessful in obtaining the contract on the bid which you first filed? That was the bid for the E-1 contract.

A. Yes, sir.

Q. And do you know that the successful bidder wherein you were unsuccessful on the E-1 kit was the Cappel-MacDonald Company of this city?

A. Yes, sir.

Q. Do I understand your testimony properly that you were successful in securing a contract based upon your bid as respects the D-1 kit?

A. Yes.

Q. Now, to attempt to clarify further, am I correct in understanding that one of the component parts of the E-1 kit, that is, the contract you didn't get but which you bid on, the E-1 kit, was a ski goggle?

A. A ski goggle is correct.

Q. And that one of the components in the D-1 kit contract that you did get was a sun goggle or sun glass?

A. That is right.

Q. Which term is correct, "sun goggle" or "sun glasses"?

A. The Air Force call it "sun goggle". It is an anti-glare goggle, is what it is.

Q. So, when you prepared to submit bids, both as to E-1 and D-1, it was necessary for you to familiarize yourself with all of the various components that were required to go into that kit in the specifications?

A. That is right.

Q. In order to learn that, did I understand that you went to Wright Field and came in touch with Mr. Hollifield, one of the defendants in this case, and that he showed you or exhibited to you the items of merchandise, that you call them, that were required to compose the E-1 kit?

A. Yes.

Q. And among those items of merchandise or component parts was a pair of ski goggles?

A. Yes.

Q. Did you confer with anyone at Wright Field along similar lines for similar purposes in order to acquaint yourself with the component parts which composed the D-1 kit, that you ultimately secured a contract to purchase?

A. I did.

Q. And was there exhibited to you a specimen sun goggle as was required in the D-1 kit?

A. There was.

Q. Am I correct in understanding that you found at that time some difficulty in securing price quotations or available manufacturers through whom you could purchase these component parts that you in turn would have to put into the kit along with other components?

A. Yes.

Q. I believe, to use your words that you said you had a great deal of difficulty securing a price?

A. That is right.

Q. Now for the moment, let us confine ourselves to the E-1 kit, as to which you were an unsuccessful bidder. Among the components which you would have had to assemble in order to compose completely this kit was ski goggles. Correct?

A. Yes.

Q. I believe you said when you looked around the country, so to speak, to see where you could obtain that item that you had difficulty in securing a price?

A. That is right.

Q. And you enlarged by saying that the American Optical Company refused to manufacture or did not appear willing to even manufacture the item?

A. Originally that is true.

Q. But ultimately they expressed agreement to manufacture it but said they would not do it for less than $8.50 an item; is that correct?

A. That is correct.

Q. Now, at the time that you were undertaking the task of learning where and from whence you could get these various components for the purpose of preparing your bid on the E-1 contract which contained the ski goggle, it was rather a progressive process, was it not? You would find and secure an item one place and then go on to your next item in preparing your bid.

A. I had several people working on component parts.

Q. You had other people in your organization working on the bid?

A. I had approximately three engineers working on the bid, to prepare the bid.

Q. And then as you approached the date line for filing that bid, which was the 13th of October, I assume that you practically had completed or enlarged to where you could acquire almost all of the component parts; is that right?

A. That is right.

Mr. Kelley: May I at this time call upon the government, respectfully, to produce for my examination of Mr. Buchsbaum, as to which you elicited testimony on the direct examination, the bid on the E-1 kit?

(After counsel for the government produced said document:) Would you please mark this for identification as Defendant Opper's exhibit?

The Court: Mark it as Defendants' Exhibit A for identification.

Mr. Kelley: This purports to be a bid submitted by Mr. Buchsbaum in connection with the E-1 kit contract.

Thereupon said bid on the E-1 kit was marked for identification as Defendants' Exhibit A.

Q. Mr. Buchsbaum, I hand you what has been marked for identification Defendants' Exhibit A. Will you examine it and state whether or not you can identify it?

A. That is a bid.

Q. Will you state first, can you identify that?

A. Yes, I can identify it.

Q. What is it?

A. The bid that I submitted to the government for E-1 kits.

Q. That is the bid that you submitted on the 13th of October 1950?

A. That is right. That is correct.

Q. Now, that document consists of several sheets, does it not?

A. Yes, consists of quite a few.

Q. Each relating to some required data that must be furnished with a bid?

A. That is correct.

Q. In relation to the size of your company, for example?

A. That is correct.

Q. Delineating various items that you propose to deliver and procure?

A. That is correct.

Q. And in part indicating sources of supply from which you intend to procure?

A. That is correct.

Q. The prices at which you expect to be able to procure?

A. That is correct.

Q. Coupled with the unit price for which you proposed to sell to the government?

A. That is right.

Q. Multiplied into the number of units desired by the contract?

A. Right.

Q. Resulting in a total contract price?

A. Right.

Q. Now I will ask you to refer inward of the several sheets—since they are not numbered it is rather hard for me to identify them—Referring to the sixth sheet from the front,—

The Court: Call that Defendants' Exhibit A-1 for identification.

Thereupon said sixth sheet from the front of Exhibit A was marked for identification as Defendants' Exhibit A-1.

Q. Subdivision 1 refers to the—the sixth sheet which is to be found in Defendants' Exhibit A—I do not wish you to read from the contents, but will you state whether or not on that sheet there is set forth any reference to ski goggles and any price stated in connection therewith?

A. There is ski, mountain type 1 goggle mentioned here and a pure estimate of $5 each.

Q. Quoting the word "pure" estimate?

A. Yes. At the time I put the bid in I didn't have the price from the American.

Q. At the time you composed that sheet with that word, you did not have a definite price?

A. I did not.

Q. Nor did you have a definite supplier.

A. Yes. I don't mention the supplier.

Q. You didn't have a definite supplier ready, willing and able to furnish that item at an agreed price, did you?

A. I want to see if the supplier is listed in here.

Q. I don't mean to hurry you. Will you look further toward the front of that Exhibit, Defendants' A for identification, specifically to the third sheet, being small in size, to which I might refer for identification as Defendants' Exhibit A-2?

Thereupon said sheet in Defendants' Exhibit A for identification was marked for identification as Defendants' Exhibit A-2.

Q. (Continued) I have been directing your attention to the third sheet, being small in size, which has been marked for identification Defendants' Exhibit A-2. You identify and recall that, do you?

A. Yes. It was an alternate bid that I put in there.

Q. Will you state when, in point of time, you attached that alternate bid, as compared with the date you actually filed the bid as a whole?

A. To my recollection, it was filed at the same time I put the bid in, the same day, the 13th.

Q. Now, you had to have acquired certain specific information before you were able to attach that alternate bid, did you not?

A. That is correct.

Q. I recall that in your direct examination this morning, you made this statement, or a statement in substance to this effect, that you had gone up to the Field in connection with filing this bid and that when you learned that the goggles, Opper goggles were approved then and because of that knowledge and their approval, you attached to your bid this alternate and filed it?

Mr. Aug: Objection. There is nothing in the record that indicates that statement was made.

Mr. Kelley: We will have to go back to the record. I will withdraw the question, if the Court will permit me.

Q. Did you make the statement to this effect, that when you learned that these goggles were approved, you included in your bid an alternate proposal and filed it?

Mr. Aug: Objection. There is nothing in the record to that effect.

Mr. Kelley: Well, I will contest that.

Mr. Aug: Let's have a reading of the record.

Mr. Kelley: We will have to go back, perhaps recess.

The Court: Are you objecting?

Mr. Aug: To the best of my recollection that statement is not in the record.

The Court: Ask him if he testified to that this morning. If there is any dispute about it, we have an official court reporter here.

Mr. Kelley: I am willing at this moment to withdraw the question and approach it from a somewhat different direction.

Q. Mr. Buchsbaum, at the time you filed this bid, had you had in your possession a goggle, that is to say, a ski goggle of a type which you proposed to offer to the government as an item, a component in this contract, if you got it?

A. I did.

Q. From whom had you obtained that goggle?

A. Mr. Opper.

Q. And you had it in your hands, did you not?

A. I did.

Q. Did you bring that goggle to Wright Field?

A. I did.

Q. Did you do that prior to filing this bid?

A. I did, the same day, the morning.

Q. But at an hour prior to the hour on which you filed that bid?

A. Correct.

Q. Now just tell the Court and jury, if you will, where you took that set of goggles, who was there and what was said with reference to them?

A. I brought the goggles to the Aero Med. Lab. which is in Wright Field. Mr. Hollifield was the project engineer on the E-1 kit. He was there.

Q. That is on the E-1 kit, you say?

A. On the E-1 kit.

Q. What we are dealing with here.

A. He was the project engineer; he was in there and also in the office a man by the name of Mr. Hanselman, Mr. Barker and a Mr. Murray, at that time, who later became an officer.

Q. May I pause for a moment? Are you familiar with their full names, or do you know only the last names of those gentlemen whom you just mentioned?

A. Mr. Hollifield we called "Bob".

Q. You mentioned a Mr. Hanselman.

A. I don't know his first name.

Q. You mentioned a Mr. Murray?

A. I don't know his first name.

Q. Does the name Norris suggest anything to you?

A. No, it doesn't.

Q. Hanselman, Murray, Barker, Hollifield?

A. Yes.

Q. Were there any others?

A. To the best of my knowledge nobody else.

Q. Would you proceed then, please, and tell us where you met those gentlemen and what took place and what was said?

A. I told them I was having difficulty obtaining a price and a source on goggles and that "I have a pair of war surplus goggles here that look to me like it was exactly the same as the specification." I read over the specification and it looked identical and I showed this pair of goggles to the boys at the lab., the boys that I named, all of them.

Q. Those were goggles that you obtained from Mr. Opper?

A. Yes, sir.

Q. And brought personally with you to the Field and presented them as you have said?

A. Right.

Q. Now would you please continue as to what was said and by whom?

A. Mr. Bob Hollifield picked up the goggles and said: "I have seen these goggles before. They are no good." He said: "I rejected them yesterday or the day before. I don't remember." I forget what he said at that time. He said: "I rejected them very recently." I said: "Why? why were they rejected?" I wanted to know the reason. He said: "They have a component part missing, that is, the extra lenses. The goggles require a pair of extra lenses, according to the specification." And Mr. Hanselman, who was right there, with me, knew as well as I know that the extra lenses were there.

Q. Where were these extra lenses? Describe these goggles to the Court and jury. Were they in a case or not?

A. The goggles were in a case; they are folded in two and they are compactly put into a sort of a semi-circular case with a snap fastening a little flap that goes over the case.

Q. It is a leather case?

A. Leatherette. In the two flat ends of the case is a piece of felt looks like it is there to protect the glass from scratching, but behind these pieces of felt, on each side, was an extra lens.

Q. Plastic?

A. Plastic lens. There were two lenses in the case.

Q. As to the lenses in the goggle itself, were they glass or plastic?

A. They were glass.

Q. But these extra lenses were of plastic?

A. Were of plastic. I said: "They have the glasses here. You are mistaken. You haven't looked in this case very thoroughly because it is here." And Mr. Hanselman says, "Yes, that is right." He knew they were there, too. He took them out and showed them to Mr. Hollifield.

Q. By that you mean you extracted these extra plastic lenses in Mr. Hollifield's presence and demonstrated they were in the case all the time?

A. Mr. Hollifield said he didn't know they were there. "This makes it different," he says, "Just a minute." And with that, to my recollection, he and Mr. Hanselman and Barker, I am not sure about Murray, they went in the next room across the hall, while I waited and they were comparing them with a similar pair of glasses that they had across the hall, which was a component part. Then about, I would say, ten minutes later they came back and Mr. Hollifield said: "I will approve these glasses, but," he said: "If I approve them for you," he says, "you understand they are approved for everyone else." He says, "I can't only approve them for you because that would be unfair to the other bidders." I says, "That is correct." He says, "Now I refused to approve them for Cappel-MacDonald either this morning or yesterday," I don't remem-

ber that part of it. "So, I will have to call them and tell them that I am approving these. It is unfair if I don't."

Q. Do I understand a little earlier in this conversation he had said that either a day or two before, shortly before he had told some bidder that they were not acceptable, because they didn't have an extra plastic lens?

A. That is what he told me.

Q. Now then, coming to the point of the conversation that you just referred to, he stated that having earlier told someone from Cappel-MacDonald that they were not acceptable because they didn't have the extra lens, now having learned that they did, he felt impelled, in fairness, to notify them of the change and of their acceptance; is that correct?

A. That is correct.

Q. Was there such a call made by anyone in your presence?

A. Mr. Hollifield put the call through to Cappel-MacDonald while I was there. I didn't hear the conversation. He told me he was going to tell them they were approved and they could be used by them in that manner, the same as I could.

Q. Now then to go back, when you came to that meeting that day, you had these goggles. It was your business to and you did submit them for examination and approval. Correct?

A. Right.

Q. As of the moment that you brought them with you, you had not completed your bid in every respect, had you?

A. I wasn't satisfied that I had the price down as low as I would like to bring it, because I was trying to get an order, and in order to get an order we try to bring the price down low and we really worked to the last minute trying to bring down all of the costs to the government.

Q. To be specific, referring again now to the small sheet marked for identification as Defendants' Exhibit A-2, designated alternate bid, I ask you whether or not you attached that alternate bid and made it a part of your bid

after you had this conference with the gentlemen you named and after they had told you that those goggles were acceptable?

A. I did.

Q. And was it because of their examination and stating that they approved that you did attach that alternate bid?

A. I did.

Q. And does that alternate bid relate to precisely those surplus glasses?

A. It does.

Q. And what was said there as to price? You had mentioned before, up to this moment you could get no price. The best you got was $8.50 from American Optical to supply a new one and I understand you put in an alternate bid, stating in its own terms "surplus", at what figure?

A. $1.40 each. Although I said "Inside of $5.00 each", because I estimated even though I couldn't get a price I thought I was going to be able to get them for $5.

Q. It ultimately proved $8.50?

A. At that time it ultimately proved $8.50. When we finally got the price from American Optical, our first price, they came down a little bit, but not very much.

Mr. Kelley: May I have that, please, for a moment? Mark this for identification as Defendants' Exhibit B, inquiry from Buchsbaum to Opper.

Thereupon said inquiry was marked for identification as Defendants' Exhibit B.

Q. As I recall, Mr. Buchsbaum, this morning during the course of your direct examination, you were asked when and under what circumstances you first made the acquaintance of William Opper, and I believe that you replied that somewhere around the first week of October, as best you could recall, 1950; that you had spoken to him on the 'phone prior to having a face to face meeting. Is that correct?

A. That is correct.

Q. As I recall, you also stated that someone in your company, on your behalf, directed some form of writing to Mr. Opper in relation to some component of a kit, in which you were interested. Am I correct in that?

A. That is correct.

Q. Am I correct in understanding that at that time you associated Mr. Opper solely with a compass?

A. Originally, right.

Q. Originally and at the time of your meeting?

A. That is right. That is what I called him in on.

Q. And I believe you said you learned of Mr. Opper and his association with a compass from Mr. Hollifield at Wright Field?

A. That is correct.

Q. As I recall it, you stated that in discussing generally with Mr. Hollifield possible sources for many of the components, in time in your conversation you came to the compass that you asked Mr. Hollifield, could he indicate where you might inquire as a source of obtaining that compass. Did you so state this morning?

A. Yes, I did.

Q. And did you state that at that point Mr. Hollifield said there was a man Opper somewhere in Chicago who he believed had a compass, or words to that effect?

A. Approximately that way.

Q. Did you then pursue and determine, "Well, where will I find this man?" and ask Mr. Hollifield "Where is this man? What is his 'phone number?"

A. I tried to get all the information I could possibly get, when I worked on a bid and if I didn't get the address and the telephone number, I would definitely ask him for it. So, I am certain—I don't exactly remember, but I am certain I would have asked. I did ask the address and the 'phone number. Mr. Hollifield didn't know. In my records at home where I keep my—in my little black book I carry with me, I didn't have any 'phone number or address in there. I had to look it up myself and had considerable difficulty in obtaining it.

Q. Let's pursue it just a little further. At the moment you first heard the name Opper, it was in connection with a compass and that name was uttered to you by Mr. Hollifield; is that right?

A. He gave me the name. He didn't utter.

Q. For the first time that name was given you. And then did you not say "Well, where is this man? What is his address? What is his full name?" That being the first time you ever heard the name.

A. Yes. I asked him where he could locate Mr. Opper. I might not have asked for his first name.

Q. And his reply, as you recall, was that he didn't know, just Chicago?

A. He said he was in Chicago and I could find him there somewheres, he didn't know where.

Q. Now having returned to Chicago, you knew nothing more than the name Opper. No name or initials other than Opper and the fact that you believed he knew something or had compasses?

A. That is right.

Q. I show you what has been marked for identification Defendants' Exhibit B. Will you examine it and state whether or not you can identify it?

A. That is a purchase inquiry. We have a regular purchase inquiry that we send out from our purchasing department, dated October 7th.

Q. Is that a purchase order?

A. No. It is an inquiry.

Q. Inquiry as to what?

A. As to compasses, magnetic and case, specification MIL-C-6235, requesting prices on 14,200 and delivery.

Q. And relates only to compasses?

A. Relates only to compasses.

Q. Is dated when?

A. Dated October 7, 1950.

Q. And is addressed to?

A. William J. Opper, 1250 North Stone. That is where we found him in the 'phone book. William J. Opper, 1250 North Stone, Chicago, Illinois.

Q. It is from your company.

A. From our company.

Q. Thank you. Now, subsequent to the issuance of this inquiry, did you come face to face with William Opper?

A. I did.

Q. Where?

A. In my office.

Q. Was it shortly after the date of the instrument just referred to, Defendants' Exhibit B for identification?

A. I would say it was within 48 hours, at least that quickly.

Q. Now then will you state to the Court and the jury the conversation that you had with Mr. Opper at that time and where was it?

A. That was in my office.

Q. Would you state the conversation you had then with Opper?

A. Mr. Opper came in my office and showed me the compass, told me the price, and he told me it was in production, that he had purchased the manufacturing plant of Waltham Watch Company used to own, went into bankruptcy and he bought the manufacturing plant to manufacture these compasses.

Q. Compasses?

A. Compasses and—

Q. Did he indicate he bought the plant or the dies?

A. No. He bought the equipment to manufacture.

Q. Bought the equipment to make—

A. Bought the equipment to manufacture the compass.

Q. Go on.

A. And he quoted me the price and in our discussion he asked me what I was going to use them—in what conjunction I was going to use them, where I was going to use them. I told him I was working on Air Force contract, which he knew from the inquiry. He wanted to know how I was going to use them. I told him we were going to put them in a survival kit. I had the specifications on my desk, started talking to him, and I mentioned

I was having some problems getting some of the items, and I thought maybe seeing he was in the compass business maybe he knows something of the items, maybe he could help me in locating sources of supply. So I read over the items, and in reading over the items we came across the goggles, ski, mountain, and he said "I think I have seen some of those. Maybe I will pick you up some new ones. Will that be satisfactory, war surplus?" I says, "I think it is a good idea to get them in. I will be glad to submit them, because we are trying to get these glasses. I am having a hard time." And then we went from there, I had the—I was working at the same time on the D-1 kit.

Q. Working on the D-1 kit at the same time as the E-1?

A. That is right. I had the D-1 specifications in front of me. I said: "I have some goggles here too, you know." He read over those items and he said: "I have seen glasses. I think I know some place on them."

Q. The sun glasses were a required component of the D-1 kit which you ultimately got a contract to produce?

A. That is correct.

Q. And the ski goggles which you had mentioned in that conversation, shown him the pictures, whatever it was, were a component of the E-1 kit which you bid on but failed to get. Correct?

A. That is right.

Q. Proceed, please?

A. And he says, "I will get them in as fast as I can" and I says, "O. K., the faster the better." And that was the end of that particular conversation.

Q. Now, having in mind that it was as you said, probably about 48 hours after October 7th when you issued this purchase inquiry that Mr. Opper actually came into your office, which would have placed it about October 9th. Correct? There remained only a few days in which you could file these bids, wasn't that true?

A. Very few.

Q. Your deadline for the E-1 was the 13th, four days later, and as it turned out your deadline on the D-1 was

the 19th, six days or seven days later. That is what was meant when you said the quicker the better, I take it?

A. That is right.

Q. Now then, thereafter did William Opper bring to you a sample ski goggle?

A. He did.

Q. Now, the ski goggle was the component referred to and applying to the E-1 kit that you bid for and failed to get?

A. That is right.

Q. And was that sample ski goggle turned over to you by Mr. Opper, in accordance with your earlier request, that he get one? Was that the ski goggle that you brought up to Wright Field, put on the table, talked about the extra lenses, as you testified a little while ago?

A. That was it.

Q. And at the same time and also in accordance with your request, did Mr. Opper bring to you a sample of the sun glass, a component related to the D-1 kit, which you bid on and secured the contract on?

A. He did.

Q. And in the same way did you submit that sample furnished you by Mr. Opper at your request to Wright Field.

A. I did.

Q. For an identical purpose?

A. I did, but not for the same party.

Q. Not to the same party?

A. I did.

Q. To whom did you submit the sun glasses?

A. The project engineer on the D-1 kit was Mr. Murray.

Q. The D-1 kit was the contract that you succeeded in getting and the contract which you have fulfilled practically in toto. Correct?

A. Except for the last, two contracts have been completed; one has not been.

Q. You have three contracts all for D-1 kits?

A. That is correct.

Q. But in varying amounts. Your first contract was for a certain number of D-1 kits. Then you got a second contract for an additional number and then a third contract for still an additional number. The first two of those you have fulfilled all of your deliveries?

A. Yes.

Q. Without objection or rejection?

A. That is right.

Q. The government has accepted them?

A. The government has accepted them.

Q. As to the last contract you are in production and expect to complete your fulfillments by July or thereabouts?

A. That is correct.

Q. Now then you state, if I understand you, that the project engineer, and that would be in the land survival unit, would it not, at W ight Field?

A. That is right.

Q. Or the Aero Med. Lab.?

A. Right.

Q. That the project engineer in the land survival unit, who had charge of the D-1 kit that you produced, was Mr. Murray?

A. That is right.

Q. Do you know where Mr. Murray is today?

A. I understand he is an officer. I don't know where he is. I saw him—the last time I saw him was about three months ago. I met him somewheres at Wright Field. I bumped into him and he told me he was going overseas. I haven't seen him since.

Q. Was it to Mr. Murray that you brought the sample sun glasses relative to the D-1 kit for examination and approval?

A. Right.

Q. And was that approval granted to you?

A. It was after inspection.

Q. Both of the goggles that you have referred to, the ski goggle in relation to the E-1 kit in which you were an

unsuccessful bidder, and the sun goggle in relation to the D-1 kit, in which you were the successful bidder, you submitted both of those samples for approval and secured approval of them. Correct?

A. I did.

Q. You obtained both of those samples from Mr. Opper. Correct?

A. I did.

Q. And he furnished those samples at your request. Correct?

A. Yes.

Q. Now, after you had filed your bids with the government, at Wright Field, both on the E-1 and the D-1, I will ask you whether or not, on occasion, you would continue to see Mr. Opper, meet him for one purpose or another?

A. May have met him, not very often, but he may have come up to find out how things were getting along, looking for business, as most people do.

Q. You did, of course, purchase goggles from Mr. Opper, thereafter, after you submitted your bids and got the one contract, then you made additional purchase orders and bought these sun glasses from him, did you not?

A. I did.

Q. And of necessity then you continued to deal with him after you filed your bids and got your one contract?

A. That is right.

Q. Now, I ask this, Mr. Buchsbaum, at any of the times that you had conversation with Bill Opper, after your bids were in, did Bill Opper ever inquire of you as to how a fellow went about going out to Wright Field and seeing people in charge, where he could learn of what might be needed?

A. Yes.

Q. Tell us about that conversation and, first, will you fix it as close in time as you can, or if you can't fix it in time say so?

A. Must have been during October. I don't remember

the date, but it was during the time I was working on bids. I didn't have any orders as yet, but we were working on bids and he was in my office and said: "Maybe there is some other business I can obtain through the Air Force. There may be some other war surplus I can buy and sell. I have a lot of ins." He said: "When the war ended I bought a lot of war surplus and I dealt in them and I know all about these things and I may be able to fit into the picture."

Q. You, yourself, earlier had shown him various components and asked him whether he might locate some of them. Correct?

A. Yes.

Q. Did you understand when you met him that he had been engaged in the toy business and in premiums that go into boxes and things like that; that surplus items are used as parts or premiums?

A. He told me that.

Q. No, this conversation that you had with him relating to the possibility of his going to Wright Field and learning if there might be some other items in which he might do business with the government, would that conversation have taken place after you had taken Mr. Opper's goggles up to the Field?

A. It came after.

Q. In other words, it came after the 13th of October?

A. Yes.

Q. Now, will you state what you told Mr. Opper when he inquired generally about, "How would I go about going to the Field?"

A. I told Mr. Opper he should go to Dayton, Ohio, to Wright Field, and I suggested that he would 'phone Mr. Hollifield for an appointment.

Q. Did he ask for Mr. Hollifield's 'phone number or building, or how he would get in touch with a man named Hollifield?

A. He asked how to get in touch with him. I said: "The easiest way to do, when you get there, ask Mr. Holli-

field how to get there. You have to get a bus. Ask him where to get the bus. I don't remember the building number."

Q. And then to recapitulate, at the time that he made inquiries generally about how to get around at Wright Field, at the time when you suggested that he should call a man named Hollifield and ask him where to come and how to get there, that was subsequent to the 13th of October, when you had filed your bid?

A. Yes.

Mr. Kelley: May I request a little recess at this time? We have gone halfway through our afternoon session.

The Court: You are not quite through?

Mr. Kelley: No, sir. I should say I will probably have another half or three-quarters of an hour at least.

The Court: Take a little recess.

Thereupon a short recess was had.

Q. Mr. Buchsbaum, I have only one or two more questions. Now when, approximately on the 9th of October, at your request, Mr. Opper came to your office, you showed him some pictures and specifications, he being a man in the toy business, when you asked him to see if he could secure for you samples of the ski goggle, which you needed in connection with your bid on the E-1 kit, when you asked him to secure for you samples of the sun glasses or sun goggle that you needed in connection with the D-1 bid, both you and Mr. Opper knew that you were asking him to go into the market and obtain for you samples of government surplus material, did you not?

A. Yes.

Q. When you submitted your bid which is marked Defendants' Exhibit A for identification, and in particular as a part of that bid, you submitted Defendants' Exhibit A-2, your alternate, the government as well knew that you were offering to submit surplus—war surplus goggles, did it not?

A. They did.

Q. It so says right there, does it not?

A. It does.

Q. I will direct your attention to Government's Exhibit 22 in evidence. I believe you read the entire letter to the Court and jury. Now, in this letter you as a contractor are submitting to the government, the other party to this contract, a list of materials which you requested their consent to permit you to use in those kits, all of which constitute deviations from the strict provisions of the contract; isn't that correct?

A. Not necessarily.

Q. Do several of them constitute deviations in some measure?

A. Three of them do; one of them doesn't.

Q. Three had requested deviations from the contract then in existence and one of them does not request the deviation?

A. That is right.

Q. Now, what are the items as to which you requested deviations and give your reasons for requesting them?

A. Sun goggles, Type 1, that is item No. 11; sun hat No. 13; police whistle No. 32.

Q. So that in addition to the sun glasses, sun goggles—

A. "Sun goggles" is better.

Q. In addition to requesting the government to consent to a deviation as respects the sun glasses that we are dealing with here in this case, you asked the government to also consent to deviations as to two other items unrelated to the sun glasses, that is to say, as to the item of whistle and as to a sun hat?

A. That is right.

Q. Now, as your request would be acted upon at Wright Field, the element of the arms organization, that is to say, the land survival unit, which had to pass on the sun glasses did not have anything to do with whistles, did it, as far as you know?

A. No.

Q. Your request for deviation on the whistle would have gone to another branch entirely, wouldn't it, from the land survival, a different branch than the land survival?

A. I don't exactly follow the question. Please repeat.

Q. To what branch of the Air Force, if you know, if you don't know, state, would your request for deviation as to a whistle go, in ordinary channels for consideration and review, and either approval or rejection?

A. It says here that the whistle is made in accordance with U. S. Navy specifications. Therefore, if you want to get a change or deviation, you have to go to the Navy.

Q. And that would be some place other than the land survival unit?

A. Probably in Washington or in Philadelphia.

Q. And when, after the Army had considered your request, the Air Force, as to whistles, ski goggles, sun hats, and the other items, when, as I say, on February 12, 1951, you received the results of their review in response to your review in response to your request, you were told, were you not, as is revealed by Plaintiff's Exhibit 24 in evidence, that your request—"The following list of samples submitted for approval as components of the D-1 survival kit are hereby approved" and that included not only the sun goggle, Type 1, but the sun hat and the whistle as well?

A. And the file as well. That was not a deviation, the file.

Q. With respect to the other three items, the goggle, sun hat and whistle?

A. That is right.

Q. But all three requests for deviation were approved. Correct?

A. Yes, sir.

Mr. Kelley: That is all.

Mr. Svoboda: No further question, your Honor.

The Court: Anything further on behalf of the government?

Mr. Aug: Yes, if your Honor please.

The Court: Redirect. All right.

Redirect Examination, by Mr. Aug.

Q. On October 13th of 1950, you took goggles to Wright Field that Opper had given to you; is that correct?

A. I did.

Q. On that date you changed in your bid on the E-1 kits, from the price that you had originally inserted in there to the price that the Opper goggle was to be furnished; is that correct?

A. I did.

Q. Now, you put that in the nature of an alternate bid?

A. Of an alternate bid, right.

Q. What is an alternate bid?

A. An alternate bid means that the fact—the reason I did that was this: The fact that engineering would approve an item doesn't necessarily conclude that the item will be accepted by the government. It means, as far as they are concerned, they would approve it, but the contracting division must also approve it and until you have that approval it is not approved.

Q. In this alternate bid were you saying to the government, "Take your pick"?

A. I was saying—

Q. Is that what the alternate bid means?

A. I was saying to the contracting officer, "Here is two bids." I gave him the bid with the proper goggle and the bid with the war surplus goggle and it is up to the contracting officer to decide whether he would go along with engineering and approve the war surplus goggle.

Q. Now the goggle had been furnished to you by Opper?

A. That is correct.

Q. Now you went to Wright Field to secure the approval on these goggles; is that right?

A. I did.

Q. Were you performing those services for yourself or for Opper?

A. I was performing the services primarily and only for myself.

Q. Did you receive any compensation from Opper for performing these services?

A. My firm received a discount. If I was able to have them approved, we would get a discount from the price so that they would cost me a little less, so I could bid less to the government.

Q. Let's see if I understand it. Your firm would receive a discount on these goggles if they were approved at Wright Field?

A. If they were approved and if I would get the order and if I didn't get the order I was to get a discount on anything that I was to purchase on kits.

Q. On kits?

A. From Mr. Opper.

Q. In other words, Mr. Opper was to give you the discount; is that correct?

A. Right.

Q. Did you get a discount?

A. I did.

Q. Can you tell us how much that discount amounted to?

A. Total discount on the entire business I gave Mr. Opper came to $4000.

Q. In other words, your trip to Wright Field in which you secured the approval of this goggle was worth $4000 to you, is that correct, to your firm?

A. To my firm. May I answer that a little differently?

Q. Answer it any way you want to.

A. I was trying to buy my goggles for less money. Mr. Opper quoted me a price and he said: "I can't sell it for any other price to you because that is my price to everyone."

Q. But Opper got $4000 less than he would have had, is that correct?

A. Yes, sir. The government saved that money, incidentally, on my prices.

Q. Now, after you returned from Wright Field, this

trip of October 13, 1950, you were asked by Mr. Kelley to state the nature of a conversation you had with Opper, in which I believe it was stated that Opper asked you, "How do you get around at Wright Field?" Was that the substance of the question?

A. He asked me who he should see at Wright Field to find out what type of business he could obtain through war surplus.

Q. And you answered that question by telling him to see Mr. Hollifield.

A. Told him to 'phone Mr. Hollifield and make an appointment.

Q. Can you fix a date as to the time of that conversation?

A. I would say within one week of the 13th of October 1950.

Q. That would be then October 20, 1950?

A. Yes, approximately in that time.

Q. Approximately October 20th. Now, on this October 13th visit you stated there was an approval. Was there anything in writing?

A. No, sir.

Q. You had nothing from the government in writing which said that the goggles that you brought down there were approved; is that correct?

A. Couldn't get anything in writing, I had no contract.

Q. The answer is, there was nothing in writing?

A. No.

Q. On January 8, 1951 you had a letter—you had two letters and you stated that you took those letters and three pairs of goggles to Wright Field; is that correct?

A. Yes, sir.

Q. Now, in the letter of January 8th, in the letters of January 8th, you requested the approval of the goggles which you were furnishing the government; isn't that correct?

A. Yes, sir.

Q. Now the goggles that went along with the letter of

January 8th, was a different set of goggles than you took down there in October of 1950; isn't that correct?

A. Yes, sir.

Q. Then in the letter of February 12, 1951 you were notified by the Air Force that the goggle which you had submitted in the letter of January 8th had been approved; is that correct?

A. Yes, sir.

Mr. Aug: Mark this for identification Government's Exhibits 25, 26, 27, 28, routing record sheets.

Thereupon four routing sheets were marked for identification as Plaintiff's Exhibits Nos. 25, 26, 27 and 28, respectively.

Mr. Buchsbaum, I will hand you Plaintiff's Exhibit, marked for identification as No. 25, and ask you to take a good look at it.

A. (Witness does as requested by counsel.)

Q. I will ask you, Mr. Buchsbaum,—I don't want to hurry you. I will ask you if after the examination that you have made, have you ever seen that instrument before?

A. I don't remember.

Q. You are stating then, to the best of your recollection, you never saw that instrument before?

A. Not written up in this way, I never saw it. I have seen it written up in a different way.

The Court: The question is, did you ever see that document?

The Witness: Not to my knowledge.

The Court: All right.

Q. Were you ever aware of the contents of this instrument?

A. I am aware of it.

Q. When did you become aware of that? Did you know—

Mr. Kelley: The witness started to answer your question.

A. I don't remember.

Q. Do you know the contents of that exhibit on March 12, 1951?

A. I knew Item No. 9, 11 and 13 and 32 and Item No. 14 there was a compass.

Mr. Kelley: Just a moment. If the Court please, the witness doesn't understand this situation. There should be no going into the substance of this until it is presented by a man who can identify it. He doesn't know any more about it than the janitor of this building.

The Court: That is what we are trying to find out.

Mr. Kelley: My objection is, he shouldn't go into the substance of the document, any words out of it.

The Witness: This instrument, to my knowledge, is not in my files in this form.

Q. I will hand you Government's Exhibit No. 26, marked for identification, and ask you to state the contents of that memorandum?

A. I never saw this article, to my knowledge.

Q. I will hand you Plaintiff's Exhibit No. 27, marked for identification, and ask you to take a look at that and state whether you have ever seen that memorandum before?

A. Never saw this article with the exception of a conference we have had before here a few days ago.

Q. That memorandum has never been in your possession?

A. Never been in my possession.

Q. I will hand you Government's Exhibit marked 28 for identification and ask you it you have ever seen that? Take a good look at it. Ask you if that has ever been in your possession?

A. Never been in my possession.

The Court: I don't think that answers the question. Read the question.

The Witness: I never saw it before, except for a few days ago, when I was out in the office here; never saw it before.

Mr. Kelley: Does that mean in the United States Attorney's office?

The Witness: Yes, sir.

Q. Never saw it before?

A. No, never.

Q. Mr. Buchsbaum, you have stated that the goggles furnished by you in the D-1 kit contracts which you had with the government, went through without any objection, to your knowledge, without any objection or rejection, to your knowledge. Is that an accurate statement of what you have said?

A. On the first two contracts.

Q. On the first two contracts.

A. Right. On the third contract, recently, approximately—well, as recent as three or four weeks ago there was an inspector that came in—

Mr. Kelley: Just a moment. I object to this because it is beyond the period involved in this case.

The Witness: Up until a few weeks ago everything was accepted.

Q. You have had a chance to thoroughly examine these exhibits marked for identification?

A. I have examined them and to the best of my knowledge I have never seen any of them. I can definitely state that the last three you showed me. The other one I don't think I have seen it. The articles, I know the articles and that is why it seems that I have seen it but I didn't see it in that form.

Q. Did you have any personal knowledge of the contents of these exhibits marked for identification?

A. I had no knowledge of any of those letters.
Q. Or their contents?
A. Or their contents.

Mr. Aug: We are through with the witness, your Honor.

The Court: That is all then, Mr. Buchsbaum.

Mr. Aug: I think counsel on both sides are willing to call it a day, your Honor. We are getting close to adjournment time. Shall we recess until tomorrow morning?

The Court: I have no objection. Now, Members of the Jury, we are about to recess the further hearing of this cause until tomorrow morning at 11 o'clock. During this recess and adjournment period you will bear in mind my usual admonition and return, if you please, tomorrow morning at 11 o'clock.
Adjourn court until 11 o'clock.

Thereupon the further proceedings in the trial of this cause were adjourned until tomorrow morning at 11 o'clock.

Morning Session.

Thursday, May 15, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

MARIJANE MORRISSEY, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

The Court: Miss?

The Witness: Miss Morrissey, that's right.

Q. Will you state your name, please?
A. My name is Marijane Morrissey.
Q. It is Miss Morrissey?

A. It is Miss Morrissey.

Q. Where do you live?

A. 249 Niagara avenue, Apartment 6, Dayton.

Q. Dayton, Ohio. And what is your occupation?

A. I am secretary.

Q. Where are you working?

A. Cappel-MacDonald Company.

Q. How long have you been employed there?

A. Three and a half years.

Q. Now, in the performance of your duties as secretary, do you have any files in your custody?

A. Yes, I do.

Q. What, in general, is the nature of those files?

A. I have the invitation to bid on contracts and I have in my possession contracts, and I have—

Q. Are you custodian of the files pertaining to the government contracts which Cappel-MacDonald have?

A. I do the filing. I am not the custodian, but I do the filing.

Q. You do the filing?

A. Yes.

Q. Do you have in your possession a letter dated October 10, 1950 from William J. Opper to the Cappel-MacDonald Company?

A. Yes, I do.

Q. And where did you get this letter, please?

A. I got this letter from my files.

Q. May I see the letter, please?

A. Surely. (Produces)

Mr. Aug: Mark this for identification.

The Court: 29 for identification. What is the date?

Mr. Aug: October 10, 1950.

Thereupon said letter dated Oct. 10, 1950, was marked for identification as Plaintiff's Exhibit No. 29.

Q. I hand you the instrument marked as Government's Exhibit No. 29, marked for identification, and ask you to

state whether there is any reference in that letter to a ski, mountain goggle. Can you take a look at the document and see if there is any reference to ski, mountain goggle?

A. Yes, there is.

Mr. Aug: We would like to offer Plaintiff's Exhibit 29 in evidence.

The Court: It may be admitted.

Thereupon said letter dated Oct. 10, 1950 was admitted in evidence and marked as Plaintiff's Exhibit No. 29.

Q. Miss Morrissey, I will now ask you to refer to Government's Exhibit 29 and read that to the jury, please.

The Court: Why can't you read it to the jury?

Mr. Aug: I will.

The Court: Read it out real loud. You always make the witness do the work.

Mr. Aug: I like to share the burden.

The Court: Stand over here so she can see what you are reading.

Mr. Aug: (Reads) "Dear Mr. Cappel:" —This letter is a letter on the letterhead of W. J. Opper, 1250 Stone Street, Chicago, Illinois. It is dated October 10, 1950. "Dear Mr. Cappel: Pardon the hand note but here is the inventory and samples:

"1. ¾" all you want .48 ea.

"2. Mountain ski goggles $1.40 ea., 32,000

"3. Signal Mirror .25 ea., 42,000 (available)

"4. Wrist compass (GS) (Gauge) $2.00, 4100

"A-9 Flying helmet .25, 106,000.

"Buoy Light ? 46,000.

"I have had the helmets and buoy lights in Indianapolis for some time. To work buoy light collapse bottom and put in water. It will burn for about an hour then sink. Used as I understand to be throwa from a plane to form a channel or marking in water. Maybe you have a better idea.

"In package a couple of compasses for the kiddies and the fair sex of the family and one for your Cadillac.

"Do you want to gamble a bit with me and buy the signal mirrors? If so, advise. Can purchase for about .085 each and freight about 1 cent.

"All items in perfect condition and should show a substantial saving over market price today.

"Best of luck and hope you get the award.

"W. J. Opper.

"P. S. A horse shoe for Mr. Wayman's secretary."

Q. Miss Morrissey, you were acting as secretary for the Cappel-MacDonald Company in October of 1950; is that correct?

A. Yes, sir.

Q. In that month, did you have occasion to work on the proposal that Cappel-MacDonald was making to the government on contract 16916?

A. Yes, sir.

Mr. Aug: Mark it for identification.

The Court: Government's Exhibit 30 for identification.

Mr. Aug: Yes, your Honor.

The Court: Is that the proposal?

Mr. Aug: It is the bid, yes.

Thereupon said bid was marked for identification as Plaintiff's Exhibit No. 30.

Q. Miss Morissey, I will hand you Plaintiff's Exhibit No. 30, marked for identification, and ask you if you can identify that instrument?

A. Yes, I can.

Q. Will you state what it is?

A. It is a request for proposal and contractor's proposal for sustenance kit.

Q. What is the date?

A. The date of the proposal is 29 September 1950.

Q. Is that the date that the proposal was submitted?

A. That was the date the proposal was submitted.

Q. Did you participate in the preparation of that proposal?

A. I did.

Mr. Aug: Your Honor, we would like to introduce Government's Exhibit No. 30.

Mr. Kelley: I would like to inquire on the voir dire very briefly as to this instrument.

The Court: Go ahead.

By Mr. Kelley:

Q. Miss Morrissey, this instrument, request for proposal, which is marked for identification as Plaintiff's Exhibit No. 30, that was in relation to what is known as the E-1 kit; is that right?

A. Yes, sir.

Q. Now, counsel for the government asked you a moment ago the date of the instrument and the date on which it was submitted to the government. Would you examine that again and reconsider the date?

A. The date of the instrument is 29 September 1950.

Q. Didn't you know that the date for filing was extended and that date is the filing date?

A. Yes. We have an amendment.

Q. When you speak of filing, you mean filing with the government, do you not, turning it over to the government as your bid?

A. That is right.

Q. I want you to reconsider only in the interest of accuracy on the date. On reflection, isn't it the fact it was not submitted on that date in September but at a later date, to be exact the 13th of October, the date for filing?

A. Yes, sir.

Q. Do you wish to correct your testimony to that extent now?

A. Yes, I do.

Mr. Kelley: That is all. We have no objection.

Mr. Aug: The instrument is admitted into evidence, if the Court please?

The Court: Yes.

Thereupon said bid was admitted into evidence and marked as Plaintiff's Exhibit No. 30.

By Mr. Aug:

Q. I would like to ask the witness, the date of this letter, which you identified as being October 10, 1950, Miss Morrissey. Now the proposal for bid which is Government's Exhibit No. 30 was sent in after that letter; is that correct?

A. That is right, sir.

Q. And you have established the date as October 13th?

A. That is right, sir.

Q. I will ask you to examine Government's Exhibit No. 30 and see if you can find who the sub-contractor is who is to furnish the goggles, pursuant to that bid.

A. We have listed W. J. Opper, Chicago, Illinois, goggles, ski-mountain, 14,200, $1.40 each. Total paid subcontractor, $19,880. That is what is listed thereon.

Q. Now, Miss Morrissey, referring to Government's Exhibit No. 30, in the list of sub-contractors and supply orders, there is Foster Grant Company. It was listed as a supplier of the goggle, and the name Foster Grant Company and goggle, ski, mountain, and the amount that they

were to furnish and the price of the article, have been stricken out. Is that correct?

A. Yes, sir.

Q. Did you do that?

A. No, I didn't strike it out.

Q. You did not. Do you know the circumstances in which it was stricken out?

A. No, I don't.

Q. Then continuing in the list of sub-contracts and supply orders, and second last in the list the sub-contractor listed is the name of William J. Opper. Is that correct?

A. Yes, sir.

Q. I will hand you Government's Exhibit 10, which is contract 16916. That is between Cappel-MacDonald Company and the Air Force. Do you recognize that contract, Miss Morrissey?

A. I do.

Q. And the date of that contract?

A. The date of the contract is November 9, 1950, it is stamped.

Q. I will call your attention to the second page of the contract and ask you what date is stated there?

A. 30th day of October 1950.

Mr. Ang: Mark this for identification 31.

Thereupon a letter was marked for identification as Plaintiff's Exhibit No. 31.

Q. Miss Morrissey, I will hand you the letter marked as Plaintiff's Exhibit No. 31 and ask you if those are your initials down at the bottom of that letter?

A. They are.

Q. Would you state what the letter is?

A. The letter is asking for approval of war surplus materials for contract AF33(038) 16916.

Q. What is the date of the letter?

A. 10 November 1950.

Q. Who is it signed by?

A. By Mr. Adam Cappel.
Q. Are you familiar with Mr. Adam Cappel's signature?
A. I am.
Q. Can you state whether that is his signature?
A. It is, sir.

Mr. Aug: We would like to offer 31 in evidence, if the Court please.

The Court: It may be admitted.

Mr. Kelley: Just a moment, if your Honor please. If the Court please, on behalf of the defendants I should like to interpose an objection to the receipt of this exhibit in evidence, on the ground that it has not yet been established either by the testimony of any witness or by the instrument itself any connection between it and the transaction to which it refers and either of the defendants in this case.

The Court: I will overrule it at this time. If they don't make any connection before the case is through—

Mr. Aug: The witness has read from the letter. It says it is on contract 16916.

Mr. Kelley: The witness can't very well read from the exhibit until it gets into evidence.

Mr. Aug: Are you admitting this?

The Court: Yes.

Mr. Kelley: It is subject to our objection, that the government must connect it up.

Thereupon said letter was admitted into evidence and marked as Plaintiff's Exhibit No. 31.

Q. You have stated that you are familiar with the files?
A. Yes, sir.
Q. The government files of Cappel-MacDonald & Company, is that correct?
A. Yes, sir.

Q. And in the course of your duties there you were familiar with contract file 16916; is that correct?

A. Yes, sir.

Q. Have you ever seen this letter before?

A. I have.

Q. You prepared the letter?

A. I prepared the letter.

Q. Those are your initials, the initials "jm"?

A. Yes, sir.

Q. Did you know what contract it referred to?

A. Yes, sir.

Q. Can you state what contract it refers to?

A. AF33(038) 16916.

Mr. Aug: I would like to read this letter to the jury, if the Court please. This letter is on the letterhead of the Cappel-MacDonald & Company, Cappel Building, Dayton 1, Ohio. Packaging Division. The date is 10 November 1950. Addressed to "Headquarters, Air Materiel Command, Wright-Patterson Air Force Base, Dayton, Ohio. Re: War Surplus Materials, Contract AF33(038) 16916. Attention: Mr. Robert Hollifield, Survival Unit, Aero Med. Lab. Gentlemen:

"It is our intention to furnish surplus material, covered in Specification MIL-S-6216, Item No. 8, Compass, Magnetic, Pocket as originally manufactured by the Waltham Watch Company. A new compass can be furnished at the same price.

"We plan to furnish at surplus, in addition to the above, the following:

"Item No. 20, Goggle, Ski, Mountain, Type 1—Specification JAN-O-1134.

"Item No. 21, Headnet, Mosquito, M-1944, Specification PQD458.

"It is our belief that the above surplus is equal or better than material that can be procured at present, and it will expedite delivery to a considerable extent.

"Samples of each of the above, herewith, have been submitted.

"Very truly yours,

Cappel, MacDonald & Co.

(Signed) Adam Cappel, Vice President."

The initials "AC/jm" and the "jm" are your initials, is that correct, Miss Morrissey?

A. Yes, sir.

Q. Now, Miss Morrissey, I will ask you if you have in your possession a document called "contract change notice No. 2" relating to contract 16916?

A. I do.

Q. May I see it, please?

A. Yes, sir. (Produces)

Mr. Aug: Mark it 32.

The Court: Government's Exhibit 32 for identification.

Mr. Aug: That is correct, your Honor.

Mr. Kelley: If the Court please, defendants interpose the same objection to this document as to the one that preceded it, that it is in no way connected up with either of these defendants, but relates solely to a transaction between the government and Cappel-MacDonald & Company.

The Court: I will overrule the objection. It may be admitted in evidence, marked as Government's Exhibit 32 in evidence.

Thereupon contract change notification was admitted in evidence and marked as Plaintiff's Exhibit No. 32.

Q. Now Miss Morrissey, I will hand you Government's Exhibit No. 32. Can you tell the jury what that is, Miss Morrissey, the formal designation?

A. The formal designation, contract change notification.

Q. Is there anything in that change notification that pertains to goggles?

A. Yes, sir.

Q. And would you read what is in that exhibit as to the goggles?

A. Yes, sir. It says, "Item No. 20 MIL-S-6216 goggle, ski, mountain, Type 1, specification JAN-Q-1134. It is satisfactory for the contractor to furnish surplus goggles."

Q. Do you see the date, Miss Morrissey?

A. Yes, sir.

Q. Would you state what the date is?

A. 27 December 1950.

Q. Will you tell the jury where you got this?

A. I extracted this from my files.

Q. What file was it in?

A. In the contract file 16916.

Q. I will ask you, Miss Morrissey, if there is any reference to contract 16916 on that instrument?

A. Yes, sir. It designates the contract number AF33-(038) 16916.

Mr. Aug: Through with the witness, your Honor. That is all with the witness.

Cross-Examination, by Mr. Kelley.

Q. Miss Morrissey, counsel for the government sometime ago referred to you as secretary to Cappel-MacDonald & Company. You are not an officer of that corporation, are you?

A. No, sir.

Q. I don't wish this to be belittling in any way, but you are a typist-secretary, are you not?

A. Yes, sir.

Q. And hold no office in the corporation?

A. That is right, sir.

Q. Are you secretary, private secretary to any particular individual in the company?

A. At the present time I am private secretary to Mr. Ralph Cooper.

Q. Now as to the times we have been referring to back in 1950, from October, let us say, on through until December, were you private secretary to any one individual?

A. I was private secretary to Mr. Adam Cappel.

Q. And he is still living, isn't he?

A. Yes, sir.

Q. Where is he?

A. I don't know his whereabouts.

Q. When did you last see him?

A. I last saw him—I am sorry, sir. I can't recall the exact date, but it has been at least six months ago.

Mr. Aug: Your Honor, I don't quite get the line of the questioning here. I don't see what is pertinent about the whereabouts of Adam Cappel.

The Court: Go ahead. Counsel may inquire.

Q. Where is your office located in the Cappel building?

A. Where is my office located?

Q. Yes.

A. Fourth floor, Cappel Building.

Q. And it is your testimony that you haven't seen Mr. Adam Cappel in six months?

A. I haven't seen Mr. Cappel.

Q. Have you talked with him on the telephone?

A. Yes, I have.

Q. When did you last talk with him on the telephone?

A. I talked with him on the 'phone two weeks ago.

Q. Where was he when you had the 'phone conversation?

A. He didn't tell me.

Q. And you don't know to this moment?

A. No, I don't.

Q. Was it your understanding he was in the city?

A. Yes, it was.

Q. Who are the officers of this corporation?

A. Mr. E. F. MacDonald is the president. R. S. Bare is secretary. A. W. Clement is treasurer.

Q. Are all of those officers present in this city?

A. Yes, sir.

Q. Having reference to Government's Exhibit No. 10, that I believe you identified and it has been previously

identified as a contract between the United States government and the Cappel-MacDonald Company.

A. Yes, sir.

Q. Who was the contracting officer of Cappel-MacDonald Company who executed that contract?

A. Mr. Adam Cappel executed it as vice-president and Mr. Robert S. Bare certified it as secretary.

Q. Now you have no personal knowledge concerning the negotiations between the government and the Cappel-MacDonald Company which culminated in the contract, have you?

A. No, I haven't.

Q. I direct your attention to Government's Exhibit 30 in evidence, which has been identified as a request for proposal and counsel for the government directed your attention particularly to a sheet in this exhibit, and having observed it you testified that the name of a certain concern appearing theron in typewriter had been stricken out by a line being drawn through it; is that right?

A. Yes, sir.

Q. Now the line runs through several typed columns, does it not?

A. Yes, sir.

Q. What is it—what appears there in typewriter crossed out by a line in the first column?

A. What appears there?

Q. Yes.

A. Foster Grant Company, Leominster, Massachusetts.

Q. Immediately opposite that in the next column?

A. Goggles, ski, mountain.

Q. In the next column?

A. Quantity 14,200.

Q. In the next column?

A. Unit price $5.

Q. In the last column?

A. $71,000.

Q. Now all of those words that appear in typewriter that you just read have been stricken out by drawing a line through them?

A. Yes, sir.

Q. Now, would you turn to the last sheet of this character and I direct your attention to the bottom two typewritten lines. Read the first of those.

A. W. J. Opper, Chicago, Illinois.

Q. And the next column?

A. Goggles, ski, mountain.

Q. And the next column?

A. 14,200.

Q. And the next column?

A. $1.40.

Q. And the last column?

A. $19,880.

Q. That relates to the same article as the one stricken out?

A. Yes, sir.

Q. Now the total project in dollars, as to Opper is as you just read $19,880?

A. Yes, sir.

Q. And earlier the other supplier whose name is stricken out, the total is what?

A. $71,000.

Q. There is another typewritten line beneath the line where Mr. Opper's name appears, isn't there?

A. Yes, sir.

Q. That relates to whom?

A. B. T. Crump, Inc., Richmond, Virginia.

Q. And in relation to what items?

A. Axes, hand, Hudson Bay type.

Q. The last two typewritten lines on this sheet, the first one being the one you read, "William J. Opper, Chicago, Illinois, goggle, ski, mountain, 14,200, 1.40, $19,880," and the last which follows, "B. T. Crump Co., Inc., Richmond, Virginia," and so on, those appear to be in different typewriting than all the entries on that page which precede them?

A. Yes, sir. They are original.

Q. Whereas the other lines are carbon impressions?

A. Yes, sir.

Q. I don't recall whether you were asked: Did you personally cross off the lines that we have been talking about?

A. I didn't cross off the lines.

Q. Do you know who did?

A. No, I don't.

Q. I think you said you don't know any of the circumstances surrounding it?

A. No, I don't.

Q. Do you know who inserted in originally the name Opper on the last sheet that we have referred to?

A. I was told to do it.

Q. You did that?

A. Yes, sir.

Q. Who told you to do it?

A. Mr. Adam Cappel.

Q. Where were you when he told you that?

A. I was in my office.

Q. And on what day did he tell you to do that?

A. October 13, 1950.

Q. About what time of day was it?

A. In the middle of the afternoon.

Q. In the middle of the afternoon, on the 13th of October?

A. Yes.

Q. You knew then, didn't you, by 5 o'clock of that day the bids had to be in?

A. Yes, sir.

Q. Did you discuss or did you overhear any discussion by any of your employers, or any officers or employees of the company, the reason for striking out the one line and inserting Mr. Opper with his different price on the other?

A. No, sir, I did not.

Q. To this day you have no knowledge as to why that was done?

A. To this day I do. I know now.

Q. Only what someone has told you?

A. Only what someone has told me.

Q. But the person who directed you to do that was Mr. Adam Cappel?

A. Yes.

Q. And you spoke to him here in the city of Dayton a few days ago, or a short time ago?

A. Yes.

Q. Now, as to what has been marked Plaintiff's Exhibit 29 in evidence, the date on that letter is October 10, 1950?

A. Yes, sir.

Q. And I think that Mr. Aug read that to the Court and jury?

A. Yes, sir.

Q. When did you first see that letter?

A. I first saw the letter on October 10, 1950.

Q. Do you open the mail, incoming mail?

A. Yes, I do.

Q. Not for the entire company?

A. No.

Q. To what particular office was that directed, if you know?

A. It was directed to the government office.

Q. You are recalling now, remembering the envelope?

A. No, I don't.

Q. But you did secure that mail and you remember opening it?

A. I didn't open this. It was laid on my desk.

Q. It was laid on your desk the same date that appears on the letter?

A. Yes.

Q. At that time, when you first saw that, did you know who William J. Opper was?

A. No, I didn't.

Q. He was a complete stranger to your office, wasn't he?

A. Yes, sir.

Q. As a matter of fact, there was no acquaintance between Adam Cappel and Mr. Opper?

A. Not that I know of.

Q. Nor any other men of your organization?

A. That is right.

Q. Now reference is made there, I think, to a four-leaf clover.

A. A horseshoe.

Q. For Mr. Wayman's secretary. Who was Mr. Wayman's secretary?

A. Well, Mr. Wayman didn't have a secretary, but I do his secretarial work for him.

Q. So it would be a horseshoe to you, but you didn't know the gentleman?

A. I didn't know the gentleman.

Q. Had never seen him?

A. No, sir.

Q. Were you aware at or about this time that your company was undertaking to explore the mercantile field in order to secure various components that would go into the kits, if it were successful in getting the contract to produce the kit?

A. Did I—

Q. Were you aware that your company was busily engaged in trying to locate these components?

A. Yes, sir.

Q. And you were aware that this kit that your company was proposing to bid on consisted of many components, 40 or more?

A. Yes, sir.

Q. Do you remember what some of them were?

Mr. Aug: May I interpose an objection. I believe we are going far beyond the scope of the direct examination.

The Court: I will sustain it. She was the person has these in her file, many prepared herself. She received that letter. Do you have anything to do with formulating the policy of the company?

The Witness: No, sir.

The Court: Why, of course not. I will sustain the objection. If you want to call Mr. Cappel—

Q. Who does establish the policies of this company?
A. Mr. MacDonald and Mr. Bare.

Mr. Aug: Objection.

Mr. Kelley: I wish to learn who might be called to give us the facts, not the typist.

Mr. Aug: It is the same question.

The Court: I will sustain the objection. This lady was called here for these documents. They speak for themselves. You may inquire about what is on the document. That is all she knows about them, so she has testified. If you wish to call some of these officers in, Gentlemen, the clerk's office is right across the hall. All you have to do is issue a subpoena.

Mr. Kelley: If the Court please, defense is not now putting in its case. The government has brought this witness who is a typist. They have introduced these documents through her. I think it only fair to ask her who might know.

The Court: You may inquire, ask her what was going on out at Wright Field because she got these.

Mr. Kelley: I think we are entitled to proper cross-examination. However, the witness is responsible for these documents.

The Court: Yes, but your cross-examination, Gentlemen, must be responsive to what is brought out on direct examination. Now, later on, if you wish to do so, you can recall this lady, make her your witness and ask her anything you want, if it is competent, then the other side can cross-examine.

Mr. Kelley: I was thinking in terms of adequate cross-examination, which should be afforded where important documents are introduced with no one responsible to answer for them.

The Court: She is responsible for them. She said she brought them from their files they have today, the very numbers we are talking about, the contracts. You are asking the lady now to tell us all about the policy of the Cappel-MacDonald Company. She says she is not qualified to do that. I don't suppose she is, in her position.

Q. As to Government's Exhibit 31 in evidence, which has been identified as a letter taken by you in dictation, signed by Adam Cappel, directed to the Headquarters, which in substance requests approval for the contractor to supply war surplus material, the last line says, "Samples of each of the above herewith have been submitted". There is no indication at the lower left corner of any enclosure. Do you remember whether samples accompanied that letter?

A. I don't know.

Q. You ultimately did come to know Mr. William Opper, did you not?

A. Yes, I did.

Q. You didn't know him on the date, October 10th, when that letter came?

A. No, I didn't.

Q. When would you say you first saw Mr. Opper face to face?

A. I met Mr. Opper after October 10th, shortly thereafter it was.

Q. You met him after the bid was in, did you not, after the 13th of October?

A. Yes, sir.

Q. So it was some time subsequent to the 13th. Could you fix it more exactly than you have?

A. I don't recall. It was two years ago and I just don't recall the date.

Q. You do know you never saw him until after the 13th?

A. I didn't see him until after the 13th.

Mr. Kelley: That is all. Just a moment. (After conferring with co-counsel) That is all.

Redirect Examination, by Mr. Aug.

Q. Miss Morrissey, just one or two questions. You were asked when you first saw or got to know Mr. Opper, and you stated that you didn't know him on October 10th.

A. That is right.

Q. You didn't know him on October 13, 1950, but you met him shortly thereafter?

A. Yes, sir.

Q. Would that have been in the month of October 1950?

A. Yes, sir.

Q. You did know William J. Opper in October 1950?

A. Yes, sir.

Q. Do you see Mr. Opper in the court room?

A. Yes, sir.

Q. Will you identify him for us, please?

A. I will. That is Mr. Opper.

Q. Can you describe him, where he is seated?

Mr. Kelley: Stand up, please.

A. (After defendant Opper stood up) That is Mr. Opper.

Mr. Aug: Let the record show the witness has identified Mr. Opper in the court room.

The Court: The witness may go down and point Mr. Opper out.

The Witness (Leaves the witness stand): This is Mr. Opper. (Resumes the witness stand.)

Q. Then you knew Mr. Opper in October 1950, Miss Morrissey; is that correct?

A. Yes, sir.

Q. Now did you have occasion to see Mr. Opper from time to time after October of 1950?

A. Yes, sir.

Q. Did you see him frequently?

A. No, sir.

Q. But you did see him?

A. Yes, sir.

Q. And all of the times was this in Dayton, Ohio?

A. Yes, sir.

Q. And the meeting of October 1950 was that in Dayton, Ohio?

A. Yes, sir.

Q. You stated that you met Mr. Opper in October, 1950?

A. Yes, sir.

Q. And the first time you ever met Mr. Opper was in Dayton, Ohio; is that correct?

A. Yes, sir.

Mr. Aug: No further redirect.

Mr. Kelley: There is some recross, please.

Recross-Examination, by Mr. Kelley.

Mr. Kelley: Your Honor, I overlooked before taking up an item. This is not strictly recross. However, I ask your indulgence. I overlooked one matter.

The Court: Certainly.

Q. I direct your attention once more to Government's Exhibit 10, which you identified as contract 16916 between the government and Cappel-MacDonald Company.

The Court: Government's Exhibit No. 10.

Mr. Kelley: Yes, your honor.

Q. (Continued) That contract was canceled, was it not?

A. Yes, sir, it was canceled.

Q. When?

A. In 1951.

Q. Had deliveries been made to the government in that contract before it was canceled?

A. Yes, sir.

Q. As to those deliveries that were made to the government in that contract before it was canceled, each kit included ski goggles supplied by William J. Opper to your company, did they not?

A. Yes, sir.

Q. Your company bought them from Mr. Opper?

A. Yes, sir.

Q. And you bought them as war surplus material?

A. I don't know, sir.

Q. You don't know that?

A. No.

Q. Having reference to Plaintiff's Exhibit 31, the letter which you took in dictation, signed by Mr. Cappel, addressed to Headquarters, that includes in its context Item 20, goggle, ski, mountain. Type 1, specification JAN-G-1134, does it not?

A. Yes, sir.

Q. And the first line of this letter which you took in dictation reads, "It is our intention to furnish surplus material", does it not?

A. Yes, sir.

Q. And in its caption and reference, it says, "War Surplus Materials", does it not?

A. Yes.

Q. Followed by "Contract 16916"?

A. Yes.

Q. And the only goggles you ever supplied were goggles obtained from Mr. Opper, weren't they?

A. Yes, sir.

Mr. Kelley: That is all.

Mr. Aug: We are through with the witness, your Honor.

The Court: That is all, Miss Morrissey.

Mr. Aug: Now your Honor, may we request a five-minute recess?

The Court: Yes. Take a little recess.

Thereupon a short recess was had.

And thereupon

ROBERT L. HOOVER, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. State your name.
A. Robert L. Hoover.
Q. H-o-o-v-e-r (spells)?
A. That is right.
Q. Where do you live?
A. 1121 Kammer avenue.
Q. Is that in Dayton, Ohio?
A. Dayton, Ohio.
Q. Where are you employed?
A. Cappel-MacDonald & Company.
Q. How long have you been employed there?
A. About eleven years.
Q. And what is your position with the Cappel-MacDonald Company?
A. Purchasing agent.
Q. You are the purchasing agent. In the performance of those duties, do you have custody of the purchase files?
A. Yes, sir.
Q. I will ask you if you have in your possession purchase orders relating to the purchase of goggles from Mr. William J. Opper?
A. Yes, sir.
Q. Will you show them to me please?
A. (Does as requested by counsel.)

Mr. Aug: Mark these for identification 33, 34 and 35, purchase orders of Cappel-MacDonald.

Thereupon three purchase orders of Cappel-MacDonald were marked for identification as Plaintiff's Exhibits Nos. 33, 34 and 35, respectively.

Q. Mr. Hoover, I will hand you Government's Exhibit marked for identification as No. 22 and ask you to identify that instrument and state what it is, please?

A. It is a contingent order for 14,200 goggles, ski, mountain, Type 1, specification JAN-G-1134.

Q. And to whom is it addressed?

A. To W. J. Opper, 230 East Ohio street, Chicago, Illinois.

Q. You have taken that from your files; is that correct?

A. I have.

Mr. Aug: We would like to offer this purchase order marked Exhibit 33 into evidence, if the Court please.

Mr. Kelley: No objection.

The Court: It may be admitted.

Mr. Aug: I would like to read this to the jury.

Thereupon said purchase order of Cappel-MacDonald Co. was admitted into evidence and marked as Plaintiff's Exhibit No. 33.

Mr. Aug: (Reads) It is a purchase order, Cappel-MacDonald and Company, Dayton 1, Ohio. It is dated November 7, 1950, addressed to W. J. Opper, 230 East Ohio Street, Chicago, Illinois. Please ship the following order: 14,200 Goggle, Ski, Mountain, Type 1 per Spec. JAN-G-1134, $1.40 each. Subject to source approval, and our receiving the formal contract for 14,200 Type E-1 Kits, or merchandise may be returned for full credit. Ship to c/o Otterbein Press, 252-254 W. Fifth Street, Dayton, Ohio. Delivery Perry Street side."

Q. I will hand you an instrument marked as Plaintiff's Exhibit No. 34 for identification and ask you to state what that is.

A. It is a purchase order covering 14,200 or 71 cases of goggles, ski, mountain, Type 1, per Spec. JAN-G-1134.

Q. Who is the order addressed to?

A. W. J. Opper, 1250 Stone street, Chicago 10, Illinois.

Q. Is there any reference in that instrument as to a contract number?

A. Yes, sir. It is for contract AF33(038) 16916.

Mr. Aug: Like to offer Government's Exhibit marked for identification as No. 34 in evidence, if the Court please.

Mr. Kelley: No objection.

The Court: It may be admitted.

Thereupon said purchase order of Cappel-MacDonald Co. was admitted into evidence and marked as Plaintiff's Exhibit No. 34.

Mr. Aug: I would like to read this to the jury. It is purchase order, Cappel-MacDonald and Company, Dayton 1, Ohio. Order No. G 1059. To W. J. Opper, 1250 Stone Street, Chicago 10, Illinois. Date, December 4, 1950. "Please ship the following order: 14,200 (71 cases) Goggle, Ski, Mountain, Type 1, per Spec. JAN-G-1134. Unit price $1.40, $19,880 in the column labeled 'Extension'. Acceptance of this order contingent upon the conditions set forth in Exhibit A. For contract AF33(038) 16916—D0-09 Certified under NPA Regulation No. 2. 3 Samples to be sent to us for: First article approval for Wright Field, Experimental Packaging by us, approval and return to you as a prototype. Increased option clause of 50% to be exercised not later than March 13, 1951. Above price is firm on delivery of this order. Delivery, immediate. Ship via Consolidated Freightways from Seattle, Washington. Terms net."

Q. I will hand you Plaintiff's Exhibit marked No. 35 for identification and ask you to state what that is?

A. It is purchase order issued to William Opper, 1250 Stone street, in Chicago, for 10,310 goggles, ski, at $1.75 each.

Q. Is there a reference to a contract number in that purchase order?

A. Contract AF33(038) 26634.

Mr. Aug: We would like to offer Government's Exhibit 35 in evidence, if the Court please.

The Court: It may be admitted.

Thereupon said purchase order of Cappel-MacDonald Company was admitted into evidence and marked as Plaintiff's Exhibit No. 35.

Mr. Aug: This is purchase order, Cappel-MacDonald and Company, Dayton 1, Ohio. "To William Opper, 1250 Stone street, Chicago, Illinois. Order No. G 1688. Date August 31, 1951. Quantity 10,310 Goggles, ski. Unit price $1.75 each. Extension $18,042.50. Contract AF33(038) 26634—DO 21 Certified under NPA Regulations. Acceptance of this order contingent upon conditions set forth in Exhibit attached. Commercial packing acceptable to common carrier, uniform quantities to shipping container. Packing list to accompany each shipment. Delivery: As soon as possible. Ship to: Cappel-MacDonald & Co., 252 W. Fifth Street (Perry Street side), Dayton, Ohio. Ship via F. O. B. Factory. Terms net."

Q. Mr. Hoover, were these all of the goggles which were ordered by Cappel-MacDonald & Company from William J. Opper?

A. They were all that were ordered for a specific contract.

Q. And the contracts are referred to in the purchase order?

A. That is right.

Q. Now, were these goggles furnished by William J. Opper?

A. One purchase order was completed. The other one was partially completed.

Q. I will hand you three government exhibits which have just been introduced into evidence and ask you which of those were completed and which partially completed?

A. This particular order was completed. That is Plaintiff's 34 exhibit.

Q. Plaintiff's Exhibit—

A. 34.

Q. Was completed. Which one was partially completed?

A. Exhibit 35.

Q. So that you are stating there has been complete delivery under the one purchase order and partial under the other?

A. That is right.

Q. Now, after Cappel-MacDonald got these goggles from Opper, they were assembled in a survival kit; is that correct?

A. That is right.

Q. Three to the kit after it was assembled?

A. Kits when they were assembled were prepared for shipment and shipment made to government destination.

Q. And included in the kit was this goggle which you had ordered from Opper?

A. That is right.

Q. Do you know how many survival kits have been furnished under this contract to the government?

A. At the time our contracts were terminated we had shipped 13,849.

Q. Were there goggles in each of those kits?

A. That is right.

Q. Were those the goggles you obtained from William J. Opper?

A. Yes, sir.

Mr. Aug: No further questions.

Cross-Examination, by Mr. Kelley.

Q. Mr. Hoover, did you bring any of your files in relation to these invoices with you today?

A. I have some, yes.

Q. Are you an officer of the Cappel-MacDonald Company?

A. No, I am not.

Q. You had nothing to do with the execution of the contract?

A. No, sir.

Q. Nor the negotiations leading up to the contract?

A. No, sir.

Q. When did you first meet William Opper?

A. I would say sometime between possibly the 1st of November to the 15th of November.

Q. Of 1950?

A. 1950.

Q. Did you issue all of the purchase orders as to which you have testified this morning?

A. No, I didn't.

Q. Who did?

A. Mr. Adam Cappel issued one order and I issued the other two.

Q. Which one did Adam Cappel issue?

A. What we call the "contingent" order.

Q. That was the one that has been marked here as Government's Exhibit 32?

A. I am not sure. I would have to see it. (After looking at Plaintiff's Exhibit 33:) That is the one Mr. Cappel issued.

Q. That is dated when?

A. November 7, 1950.

Q. What does it say down here in the middle?

A. "Subject to source approval, and our receiving the formal contract for 14,200 Type E-1 kits, or merchandise may be returned for full credit."

Q. Now then, in part, it says, "Subject to our receiving formal contract." And it is dated November 7th. The witness who preceded you to the stand, who undertook to identify a contract by its date, testified to this Court and jury that the contract in question was executed on October 30th. In that case you had already gotten the contract before you issued an invoice reciting "Subject to our receiving the contract", hadn't you?

A. Perhaps we had received an advance copy but the signed contract had not been received to my knowledge at that time.

Q. But you do not issue purchase orders except in accordance with a contract, do you?

A. That is right.

Q. Would you look at Government's Exhibit 10 and let us clear up the question of when it came into existence.

The Court: Doesn't the contract speak for itself?

Mr. Aug: It speaks for itself.

Mr. Kelley: The government brought a witness and he said—

The Court: The contract speaks for itself. You don't need to answer that question. He is called here with regard to these purchase orders and we are not going into a lot of ramifications of a man who doesn't know anything about it or wasn't asked about it. If there is any dispute about that date you and counsel for the government may dispute it out later on. At this time you don't need to answer the question. He was not called for that purpose.

Mr. Kelley: If your Honor please, he has identified and through him there has been introduced an invoice here dated November 7th and on this—a purchase order, I should say, which by its terms recites it is subject to receiving a contract. Now, as your Honor says, the contract is in evidence and it will speak for itself.

Q. So, Witness, I show you this contract and ask you to refresh yourself as to its date and answer whether or not you had a contract on the date you issued this purchase order, Plaintiff's Exhibit 33?

Mr. Aug: Now, the Court has made a ruling. The Court has overruled that type of question.

The Court: Do you object to it?

Mr. Aug: Yes, sir.

The Court: I will sustain the objection. You don't need to go into that. He isn't called as an expert.

Mr. Kelley: He introduced and identified it.

The Court: No. He hasn't identified anything but the purchase order.

Mr. Keiley: That is what I am talking about.

The Court: I know, but you are asking him now about this contract. He wasn't asked anything about the contract, and he isn't here to tell us what the other witness testified to.

Mr. Kelley: I am inquiring as to the authenticity of the thing he had and produced. If your Honor will look at it you will see the statement is made it is "subject to their getting the contract." I submit I should be able to show they already had it. Therefore, the subject is meaningless.

The Court: Of course, you can, but you can't do it on the cross-examination of this witness. If you wish to call Mr. Hoover later on, you may do so, but right now you cannot cross-examine him about something—You didn't have anything to do with the making of that contract, did you?

The Witness: No, sir.

Mr. Kelley: But he had to do with the making of this invoice, if your Honor please.

The Court: You mean to say he did not make that out?

Mr. Kelley: I mean to say that there is the statement in the invoice which he made which is contrary to the facts. I wish to demonstrate it.

The Court: You may argue that to the jury, if you wish.

Mr. Kelley: I wish to demonstrate it to the jury before I can argue it to them, sir.

The Court: Instruments speak for themselves. Suppose this Gentleman said the date of that was 1948. That doesn't change the date any. The date is on there. If he had anything to do with it, if he drew that contract or was called here about it, yes.

Mr. Kelley: May I make a statement for the record, at the Bench, to show the relevancy and materiality of this inquiry?

The Court: You may put anything in the record you wish, but I will sustain the objection.

(Out of the hearing of the jury):

Mr. Kelley: May the Court please, the witness now on the stand, Mr. Hoover, identified Government's Exhibit 33 and has testified that it is a purchase order issued by the Cappel-MacDonald Company under date of November 7, 1950. This instrument was read to the jury in its entirety and it reads in part "Subject to source approval and our receiving formal contract." There has been introduced by the government, by the previous witness, testimony that the formal contract was dated October 30th. The contract itself received in evidence over the objection of defendants recites the date of October 30th. It is thus evidence that the clause "subject to our receiving the formal contract" which appears in Plaintiff's Exhibit 33 is not in fact a true statement and its effect upon the jury, having been read to the jury, would be to infer a motive on the part of Opper to see that the goggle in question was approved, because his sale was contingent. For that reason we feel it is relevant, material and properly within the scope of our cross-examination.

The Court: The whole question is argumentative, has nothing to do with what this witness has testified to on his direct examination. Counsel may call this witness when they come to the defense and put him on as their witness, if they wish. But as part of the cross-examination, I hold it is highly objectionable and I sustain the objection.

(In the hearing of the jury):

Q. Mr. Hoover, there has been received in evidence and read to the jury Plaintiff's Exhibit 33, which calls for

14,200 goggles, ski, mountain, Type 1. You have testified that that was issued, that purchase order was issued by your company.

A. That is right.

Q. The next exhibit, Plaintiff's 34, called for 14,200 goggles, does it not?

A. It does.

Q. And you were asked on direct examination whether the items covered by these invoices were delivered and you said they were. The fact is, is it not, that one of those invoices is merely a duplicate of the other?

A. I stated that this invoice had been—or this order had been shipped complete. No mention was made of this order.

The Court: What is the exhibit number?

The Witness: Exhibit 33. We received no shipments against that purchase order. Exhibit 34 was shipped complete.

Q. Until this moment you had not made that point clear.

A. I thought I had. I am sorry.

Q. So that all that was received by you and actually purchased by you under Exhibits 33 and 34 were 14,200 items, not 28,400 items?

A. That is right, 14,200 goggles.

Q. And your company requested cancellation of the first invoice, Exhibit 33, did you not?

A. That is right.

Q. Do you have with you the letter in which you requested it be canceled and ignored?

A. I will see if I have it with me. I do have.

Q. May I see it?

A. (Witness produces letter.)

The Court: Have it marked for identification, please, as Defendants' Exhibit C.

Thereupon said letter was marked for identification as Defendants' Exhibit C.

Mr. Aug: We have no objection to that letter.

Mr. Kelley: I am merely identifying it at this stage of the trial. I am not offering it.

Q. I show you what has been marked for identification Defendants' Exhibit C. Can you identify it?

A. Yes, sir.

Q. What is it?

A. It is a letter to W. J. Opper, 230 East Ohio street, Chicago 10. Shall I read the letter?

Q. No. Does it relate to any of the invoices as to which you have testified?

A. It relates to the purchase orders.

Q. Purchase order I meant to say.

A. To which I have testified, it relates to purchase orders G-1059, G-1058, G-1060, as superceding F-5505-G, F-5506-G, F-5507-G.

Q. And did it serve to cancel the purchase order marked Plaintiff's Exhibit 33 and to substitute in its place purchase order Government's Exhibit 34?

A. That is right.

Q. Government's Exhibit 33 recites in part, does it not, as read, that "subject to source approval"?

A. That is right.

Q. Do you have within your papers source approval as to William J. Opper obtained from the government?

A. I have such a letter in our files.

Q. You don't have it here?

A. Don't have it with me.

Mr. Kelley: Mark it D and D-1.

Thereupon a document consisting of two pages was marked for identification as Defendants' Exhibit D and D-1.

Q. Mr. Hoover, I show you what has been marked for identification as D and D-1 and ask whether you can identify that?

A. This appears to be a copy of—

Mr. Aug: May we see this?

Mr. Kelley: Oh, I beg pardon.

Q. Mr. Hoover, can you identify documents D and D-1? Just state whether you can or not.

A. It appears to be a copy—

The Court: A photostatic copy.

A. (Continued) —a photostatic copy of a letter approving—

Q. A letter, photostat of the original you have in your files that you referred to a moment ago?

A. I don't know.

The Court: Can you at the noon hour get your files and bring back the original letter and compare it with that?

The Witness: Yes, sir.

Mr. Kelley: May we suspend then?

The Court: Yes, sir. Now, Members of the Jury, we are about to recess the hearing of this cause until 2 o'clock this afternoon. During this interval bear in mind my usual admonition. Return, if you please, at 2 o'clock this afternoon.

Adjourn court until 2 o'clock this afternoon.

Thereupon the further proceedings in the trial of this cause were adjourned until 2 o'clock of the afternoon of the same day.

Afternoon Session.

Thursday, May 15, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

ROBERT L. HOOVER resumed the witness stand and testified further on **cross-examination** as follows:

By Mr. Kelley:

Q. Mr. Hoover, have you had an opportunity during the recess period to examine your records to determine whether you have found therein the document, of which Defendants' Exhibit D and D-1 is a photostatic copy?

A. Not a true photostat of the document in our file.

Q. You say it is not?

A. No sir, it is not.

Q. Do you have the document in your file?

A. I do.

Q. May I see it, please?

A. (Witness produces document.)

Q. In what respects do they differ?

A. There is a pen note on the top of our document that does not appear on the photostat and there is a note or a writing at the bottom of the photostat that does not appear on our document.

Q. And other than for those two points of discrepancy, are they identical.

A. They are.

Q. Is the typewritten material identical?

A. Yes, sir.

Q. Having reference to Defendants' Exhibits D and D-1, it is dated when?

A. December 5, 1950.

Q. And is directed to whom?

A. To Cappel-MacDonald and Company, 127 South Ludlow street, Dayton 1, Ohio.

Q. And is in reference to what subject?

A. "Subject: Sub-contracts Approved under Prime Contract No. AF33(038) 16916."

Q. Who issued that source approval, that document?

A. That was issued by the—There is no statement on your copies. It is a typewritten signature at the end "Harry A. Chance, 1st Lt., USAF, Contracting Officer."

Q. And it does by its terms relate to the matter of approving source, the source being whom?

A. W. J. Opper, 1250 Stone street, Chicago 10, Illinois.

Q. And does it relate to source as respects a purchase order, one of the purchase orders issued by your company and marked in evidence today?

A. It does.

Mr. Kelley: That is all.

Redirect Examination, by Mr. Aug.

Q. Mr. Hoover, you are using the term—I don't think we are all familiar with it. What do you mean by "approving the source"?

A. Under the terms of our contract, all sub-contractors must be approved before an order can be mailed to them.

Q. And this instrument purports to be an approval of a subcontract; is that correct?

A. Of a sub-contractor.

Q. The approval of a sub-contractor; is that correct?

A. Right.

Q. Is there anything in this instrument that approves the article that the sub-contractor is supplying?

A. No, there is not.

Mr. Aug: No further question.

Mr. Kelley: That is all.

The Court: I think you ought to have that marked for identification, if you are going to have a photostatic copy. Here is the original signed by the man that sent it.

Mr. Kelley: It hasn't been offered.

Mr. Aug: It hasn't been offered. It is his document.

The Court: Just mark that the Court's Exhibit No. X for identification. Sometime we might reach the stage where that would be offered. It seems to me if you have the original document, why have a photostat, unless counsel want the photostat.

Thereupon said document was marked for identification as Court's Exhibit X.

Mr. Aug: We had nothing to do with the presentation of it.

Mr. Kelley: We did not issue a subpoena for it and I am not empowered to demand of the man that he give me his document.

The Court: All right. We have it marked now as X. That is the unknown quantity anyhow.

Mr. Aug: That is all.

MR. MONCURE NOBLE, being duly sworn, testified as follows:

Direct Examination, by Mr. Richter.

Q. Will you state your full name please to the Court and the jury?

A. Moncure Noble.

Q. How do you spell your first name?

A. M-o-n-c-u-r-e (spells).

Q. Where do you live?

A. 102 South Central avenue, Fairborn, Ohio.

Q. What is your occupation?

A. I am a special agent in the Procurement Section of the Office of Special Investigation, Inspector General, Air Force.

Q. How long have you been engaged in that activity?

A. Since the 2nd of July 1951.

Q. Have you ever met the defendant Robert Hollifield in this case?

A. Yes, sir, I have met Mr. Hollifield.

Q. Can you point him out in the room here?

A. Yes. That is Mr. Hollifield over there.

Q. Will you step down here and put your hand on his shoulder?

A. Yes. (Witness does as requested by counsel) This is Mr. Hollifield.

Mr. Richter: Let the record show he points to Mr. Hollifield.

Q. Now, Mr. Noble, have you ever had any conversation with Mr. Hollifield?

A. Yes, sir. It was on the 27th—26th of September 1951.

Q. Where was that conversation?

A. That was in the office of the O. S. I. out at the Air Base.

Q. Who was present?

A. Myself, Special Agent Lawrence Collins and Mr. Hollifield.

Q. What time of day was it?

A. That was at 9, 9:30 in the morning.

Q. Will you relate to the Court and the Jury the preliminary discussion that you had with Mr. Hollifield on that occasion?

Mr. Kelley: Just a moment. May we approach the Bench?

The Court: No. Now, Members of the Jury, you may step in the other room.

Thereupon the jury retired to the jury room and the following proceedings were had in the absence of the jury:

The Court: Now, Gentlemen, we might just as well hear all of these matters now and we will get them out of the road in the absence of the jury, so there won't be any question about it.

Mr. Richter: May it please the Court, I might suggest, subject to the Court's approval, that there are two prob-

lems we have here, first, when the confessions may be introduced; second, whether or not they may be introduced. The Court had suggested that we should go into all of these matters at this time.

The Court: I was trying to do that so we won't have the jury running back and forth every few minutes and we can talk better. We have it in the record in the absence of the jury and I can hear what counsel have to say on both sides, of course.

Mr. Richter: Now, if the Court please, the thought I had is simply this, that the relation to the second point as to whether these confessions are going to be admissible at all. It might be possible to handle that at the conclusion of the trial.

Now, we have in the Adolfson case authority for the introduction of confessions at any time during the course of the proceeding and I merely suggest to counsel and the Court if we limited the discussion, at this time to the question of when the confessions may be introduced, perhaps we could proceed and get the trial over with and argue the admissibility in the light of all of the evidence at the conclusion. That is merely a suggestion for counsel and the Court.

Mr. Kelley: While counsel has stated to your Honor one authority, he hasn't cited it. I assume your Honor must be familiar with it. But on the other hand the government takes this position, that the matter of when an inculpatory oral admission or an inculpatory written statement may be introduced as to either of these defendants is a matter governed by law, the time when it may properly be introduced.

We have decisions which we respectfully wish your Honor would consider and consider all the decisions bearing on this very crucial question before undertaking to rule upon it. Surely I wouldn't have to dwell at length upon the significance of permitting, without inquiry into their proper foundation, permitting these statements to go

into the record now and then to wait until the last moment, when the government is to close and then find out whether they ought to have gone in or not. Common reason suggests that one would pause before adopting such a rule where in a criminal case people's liberty is at jeopardy.

If there is to be an order of proof suggested to be worked out, we ask the government go forward with its proof to the point where it feels it can demonstrate that the elements constituting corpus delecti in this case have been established in this case where it would warrant the production of a confession.

If that matter must be determined now and if the government is presently intending to offer in evidence such statements, we would like to be heard at some length; we would like to be able to hand up to your Honor, let us say by tomorrow morning, upon which we could work tonight, having in mind now just what evidence is before your Honor, we would like to hand up a memorandum citing authorities. We do not want to delay, but we do think this is a very crucial point in the case and want to submit to your Honor every authority at our command so you may have that in passing judgment. We could have such a memorandum ready and in writing tomorrow morning, but we should like to hand up our written brief on this subject.

Mr. Richter: We don't mean to preclude any preliminary examination of the witness. I want to make that clear.

Mr. Kelley: If the Court please, I would like to ask for a continuance until tomorrow morning so I could prepare a statement. Could I have a continuance until tomorrow morning in which to answer Mr. Richter?

Mr. Richter: If the Court please,—

Mr. Kelley: If the Court please, there is a question as to the nature, whether it is a voluntary statement that is to be made, or whether it is a written confession.

Mr. Richter: We are advised that counsel has seen this statement and I don't know why it should be necessary to adjourn until tomorrow morning on this.

Mr. Kelley: I can only say what I said before, from my point I do wish to hand up some written form of decision so your Honor will have a chance to consider this law at leisure and deliberately.

The Court: Now, Gentlemen this matter came up in sort of an oblique way on a motion, as you recall. Now, if counsel for the defendants feel that they would like to have a little time, particularly where they think they have some law they can give to the Court, of course, I want to give them that opportunity, because if there is anything that I am lacking in, it is in a knowledge of the law. I would like to get all the law I can on the subject from both sides, so that I won't do things too quickly and then have to reverse myself or regret about it afterwards.

Now I would like to get it straightened out. That is the reason I excused the jury. I presume it will all come under some objection of some kind technically and I am going to waive the technicalities, if we can for a moment, and I would like to hear from counsel. I don't mean now. Say tomorrow on your arguments as to whether or not anything was said to this gentleman or to the other gentleman—

There was another gentleman with you, was there not?

The Witness: Yes, sir.

The Court: —or to the other gentleman with him, either verbally or in writing.

Now, first, the question is whether there is anything at all there that is competent. I understand the question of res gestae enters into the matter to some extent and, of course, I will have to caution the jury very carefully if I should let any of this in as to what their duties will be, to keep this in their mind, too.

I think it would be better to give counsel an opportunity until, say, tomorrow.

Now, Gentlemen, on Monday, as counsel know, I have another matter coming up and I have talked with counsel and you all—I have been advised on both sides it is quite satisfactory that we adjourn over Monday until Tuesday. That is correct, is it not?

Mr. Kelley: Yes, sir.

Mr. Richter: Yes, sir.

The Court: Well, now tomorrow I am only going to have one session anyhow, so as to let you Gentlemen from out-of-town have a chance to get home, and your clients, too. I thought we could run from 11 until 2 and then we will adjourn. I know we can do that without any trouble, if we don't have the jury in. I don't see much point in bringing the jury back here just to run them out and let them sit there in the other room. I think it is best to excuse the jury until Tuesday morning. Then I would like to have counsel tomorrow present by way of oral argument, if you wish to be heard, as well as your memorandums, so I could have the memorandum now over the week-end, including Monday and then when I start in Tuesday morning, I will try to be ready to rule on the matter. But I would like to be able to rule on everything so we won't have to take it up piecemeal. I mean by that as to whether any of these so-called confessions, if there are such, or conversations, whatever you want to call them, whether they are admissible at all and if so, whether admissible now, anything of that kind that you care to touch on.

Mr. Richter: If the Court please, would that give each side an opportunity to read the brief of the other and submit a reply, or will we just each submit our memorandum?

The Court: Well, there is no objection to your having the opportunity, if you get it into each others hands in time to do that by tomorrow. Can you do that? Monday I won't have any opportunity, because I will be busy otherwise. What would your suggestion be?

Mr. Richter: If your Honor please, I don't know frankly. It looks as though what we might have to do would be to exchange memorandums or else argue it orally and each present what they think the law to be.

The Court: Of course, we can't file briefs like we do in the ordinary case. We have fourteen jurors here.

Mr. Kelley: If I may just bring this up now, in view of what your Honor said about wishing to dispose of all these legal questions at this sitting, in which, of course, I concur, but we might consider this, depending upon how your Honor will rule on question No. 1, that is to say, whether these inculpatory statements, either written or oral, are admissible at this time, should your Honor rule that they are, it would then follow that we would wish to move for severance at that time. We couldn't make the motion all at once. It depends on your Honor's ruling. We are prepared to argue all points of law at one time. There would be no purpose should your Honor rule at this time, on this state of the record, they are not admissible, then there would be no occasion for us to argue the motion for severance.

The Court: I don't want to cut you off from your opportunity to be heard on both sides, because you are entitled to that.

Mr. Kelley: We should like to be heard orally tomorrow, if the Court will hear us, upon this question of whether or not, upon the present state of the record there has been sufficient proof of corpus delicti and all of its elements to permit introduction of inculpatory statements and we should like to hand up to your Honor a written memorandum that you could have to consider over the week-end in resolving this problem. We could at the same time state our position on the matter of severance.

The Court: I think it would be well to do that.

Mr. Kelley: We can do both.

The Court: The only thing where a day or two makes some difference is on account of our jurors. If it were tried to me personally, I wouldn't care how long it would take, but there are fourteen jurors here.

Well, I think Mr. Kelley's suggestion is a good one. Come tomorrow prepared to argue, first, which I think is the first question, of course, whether or not this is a proper time or whether the state of the record is in such shape as at this time to permit the introduction of these so-called conversations or documents, whatever it may be.

Now, that has to do, in my opinion, somewhat with whether there has been enough of the res gestae to justify the admission of these conversations at this time.

Without assuming anything that means anything at this time, let us assume—I don't want it to mean anything more than just a pure assumption—let us assume that the Court will hold, Yes, this is all right at this time to go ahead. Then why can't you be prepared in the alternative to argue that? It may take a little of your extra time, but still I would get the chance, it seems to me, to solve the whole problem at one time, if I have to. Do you think that is a good program or not?

Mr. Richter: We will agree to that.

The Court: Mr. Aug and Mr. Richter?

Mr. Richter: We will agree to that.

The Court: Mr. Ruffin?

Mr. Ruffin: Yes, sir.

The Court: Well, I think that is a sensible thing to do and would suit you. How long would you like to argue this?

Mr. Kelley: On the first question, Judge, that is as to whether or not this is the proper time—we might not take that much time, but if we could be allowed an hour to a defendant. Certainly we wouldn't take more than that and

I doubt quite that, since we are handing up our written memoranda, too.

The Court: I wouldn't object to that.

Mr. Richter: Provided we are given the same privilege, which I presume we will be, we have no objection to that.

The Court: Sure, whatever goes for one side goes for the other, in this case. I really think the sensible thing to do then is to excuse the jury and adjourn the case until tomorrow morning and then I will hear from counsel.

Mr. Kelley: And the jury will be excused until Tuesday morning.

The Court: I will excuse the jury now until Tuesday morning. No use for them to come back tomorrow. We will just run them in and out. Makes them tired and causes a lot of expense, without doing any good. I think it is a very serious question that the Court must give some consideration to. Can't go on without having at least some little knowledge, at least, of what counsel have to say about it. Suppose we do that.

Have the jury come in now and I will excuse them and I will adjourn court then, when we do adjourn, until 11 o'clock on Tuesday. All right, bring in the jury.

Thereupon the jury returned into the court room and the following proceedings were had in the presence of the jury:

The Court: Now, Members of the Jury, there are some questions of law that have come up and will come up that are going to take a little time for counsel to present and it is going to take me a little time to determine. So, we have agreed, with your approval, that we will recess now the further hearing of this cause now as of today, then you don't need to return until 11 o'clock on Tuesday morning of next week. That will be May 20th. That will give counsel and the Court an opportunity to go into these

matters and give me their thought upon their part and the consideration upon my part which I feel they deserve.

Now, during this rather long interval, I am sorry we have to be separated so long in the matter, but during this rather long interval, of course, we have the week-end anyhow, there would be a couple of days in there, Saturday and Sunday, we won't be out entirely—the trouble of it is they are going to make me work on Saturday and Sunday. At least, that is what they are threatening now, unless I get the C. I. O. or something after them. Be that all as it may, I am just joking. During this interval, please bear in mind my admonition: Do not permit anybody to talk to you about this case. If anybody even approaches you, wants to talk about this case while it is in progress, you must report that fact immediately to the Court. Don't discuss it among yourselves. I don't know, some of you may come from the same neighborhood, if so and you go home together and come back together, talk about anything as long as you don't talk about this case, and don't talk about it at home.

Now, don't forget what you have already heard, because that, of course, you are supposed to remember. You will have your memories refreshed by counsel later on in their arguments and all that, but please be very careful, because we have been some little time in the trial of this case, and you know you wouldn't want and I wouldn't want anything to happen, by any mischance interfere with its conclusion.

Now, Members of the Jury, you may be excused and return here, if you please, on Tuesday morning of next week, May 20th, at 11 o'clock. Counsel will remain just a second.

Thereupon the jury retired from the court room and the further proceedings were had out of the presence of the jury.

The Court: I have nothing further to take up, but I thought you may have and I thought I would give you the opportunity.

Mr. Richter: If the Court please, what time are we to meet tomorrow morning?

The Court: 11 o'clock tomorrow morning. We will adjourn court then. We will adjourn our court until 11 o'clock tomorrow morning, but the jury won't be back until Tuesday morning.

Thereupon court was adjourned until 11 o'clock tomorrow morning.

Morning Session.

Friday, May 16, 1952.

Court met pursuant to adjournment. Counsel being present as heretofore noted, the following proceedings were had in the absence of the jury:

The Court: Are counsel ready to proceed?

Mr. Kelley: Yes, your Honor. May it please the court, I assume that the defendants have the burden of proceeding with this argument since we interposed an objection to an item of evidence offered yesterday and we paused at that stage so that the Court would hear the basis for our objection. I wish to hand up to your Honor a written memorandum—

The Court: If you please. Thank you.

Mr. Kelley: —which I think fully outlines our position and my remarks now in large measure would merely be repetitious of what we have put in our brief. Therefore, I will not take very much time but would like merely to outline generally the structure of our brief, what we think the issues are and to refer generally to the nature of the authorities that we cite in support of our contention. I have just a few moments ago furnished the government with copies of this memorandum.

As a preliminary statement, it should be said that at this stage of the trial and as of yesterday afternoon, the govern-

ment undertook to elicit through the testimony of a special agent of the O. S. I. the substance of certain conversations had between that agent and the defendant Hollifield. We are informed and believe that as the trial would progress further it will be the intention of the government also to introduce through other special agents of either the O. S. I. or F. B. I. or both, the substance of oral conversations of a similar character had at other times and in addition to that possibly written sworn statements of an inculpatory nature.

It is further understood that as the trial progresses that the government will seek to introduce conversations in which inculpatory admissions were made by the defendant Opper and likewise a written document purporting to constitute inculpatory admissions.

Now, we are concededly anticipating considerably what may occur and yet I think it was the understanding of the Court yesterday and counsel for both sides, that a great purpose would be served in anticipating what is probable so that we could at this time cover several points of law that inevitably must arise, and thus save time all around and give the Court an opportunity to study at more leisure the law as the government sees it and as we see it. That we have undertaken to do, both in the memorandum which I just handed to your Honor and in a supplemental memorandum, which I shall advert to in a few moments and also give to your Honor.

Now, in the memorandum which you have, we have confined ourselves to one issue and that is the timeliness of the government's offer of evidence of this character. In other words, is the record now in such a state, has sufficient been established in support of the indictment, as of this time, that under the decisions it would be proper to admit an inculpatory statement? We say that that is not the case, that there has not been sufficient evidence introduced into this record as of this moment, as to constitute a foundation or predicate for the introduction of any inculpatory statement.

Now, counsel for the government yesterday, in the brief moment we had to discuss this issue cited a case, a case from the 9th Circuit to which we advert and which we cite by volume and page in our memorandum and that is the case of Adolfson v. United States, decided in 1947 in the 9th Circuit.

Now that case is very plain: the language is very clear, and that case holds this: "The order in which evidence to prove the corpus delicti is to be received is not important and is largely a matter within the discretion of the trial court. If proof in the nature of independent corroborative evidence to support the introduction of a confession at the time of its introduction is not important, it is sufficient if it is forthcoming at some point in the trial."

Now, no one can argue that language is ambiguous. It certainly is clear. However, we submit when the Court used the phrase that the order in which evidence of this nature was received is not important, I think the Court spoke rather lightly, because in the next breath the Court says, it rests in the discretion of the trial judge. So the appellate court cannot say that a matter that would be submited to your Honor's discretion is unimportant or important, when you would determine of its importance, and in the light of that importance or lack of it, would exercise your discretion. And thus we submit that this case is authority only for the contention that the question rests in the sound judicial discretion of the trial court.

Now, that is what the 9th Circuit has said in its most recent case. This Court with its many many years upon the Bench, surely has seen judges come and go. The Circuit now composed, whether the 9th, 5th, 4th, 2nd, may be composed of more learned or less learned men than their predecessors, but if a Circuit Court from the 9th Circuit, let us say, in the year 1940 had felt differently upon this question of procedure and had expressed their opinion, surely it would be worth this Court's consideration. It is not a matter of substance as to which the court has considered other decisions and said: "Now we feel compelled

to take a different view of the law." Thus we would follow the later decision of the Circuit. That is not the case. In both instances the Circuit was dealing with a matter of procedure, one in which anyone exercises a considerable discretion and point of view.

So, I suggest the case I am now about to cite and what is therein stated by the 9th Circuit is worthy of equal consideration, notwithstanding there is a variance in the point of time when the Court spoke and that the Court was composed of different judges. Now, in 1940 the 9th Circuit in the case of ..... v. United States, cited in the brief, that court said this on identically the same question, and I quote: "Appellant bases several of his objections and motions to strike upon the charge that the corpus delicti was not established by the evidence in the absence of the written confession." And in the next sentence I direct your Honor's particular attention, the Court then said: "It is, of course, settled that the confession cannot be admitted until the corpus delicti has been established."

Now that equally clear-cut and pithy sentence appears in a case involving the same principle, out of the same circuit, within a span of just a few years. Thus there is within the 9th Circuit now a conflict as to the views upon what is the best procedure in such a case.

Now we have undertaken to research the law as it has emanated from this 6th Circuit and we are not perfect researchers, but we have been unabe to find any decision of the 6th Circuit establishing any rule upon this question.

Now that being the case and since this is, as we contend a matter of procedure and not of substance, what should be the course to be taken by this Court, where there is no guide or rule from this Circuit on this question?

We contend that since it is procedural that this Court with propriety may and ought to look to the decisions of the state of Ohio, because traditionally matters of procedure in our Federal District Courts, when not in conflict with any federal rule should be based in keeping

with the established principles of the state court. There are many historical reasons for that. It avoids confusion as between the two courts. It places the citizen in the jurisdiction of the state court and his federal court of that district in a more secure position as to what procedure should be accepted in both courts, where you go from one to the other every day.

Thus we do suggest in our brief that your Honor give consideration to the decisions of the appellate and higher courts of the state of Ohio on this procedural question and I want to go into the question further. We have set them forth fully. We have quoted from Ohio jurisprudence. We have quoted from the Federal Rules of Criminal Procedure, from which it appears, as of today, the Federal Rules do not set forth any rule which would be in disharmony with the rule existing in the state of Ohio.

Having developed these points in our brief that upon the decisions of the 6th Circuit there is no rule, still looking to the federal cases, the 9th Circuit in one case would support the government and in one case would support us.

One case I haven't mentioned. We go to the 5th Circuit and we find the case of Butt v. United States cited herein and the 5th Circuit clearly supports the position which the defendants take here. At the risk of repetition I say that in looking to the circuits this Court will find nothing in our own Circuit, the 6th. In the 9th it will find an opinion pro and an opinion con on the same issue. In the 5th Circuit you will find an opinion supporting the defendants' contention. And thus I say that the Court could and shall properly look to the decisions in the state of Ohio, and as I have stated they favor the defendants' position unquestionably.

We reach the conclusion in our memorandum that since this is a matter of procedure and since the better rule and the general rule and the established rule in Ohio is that the confession in point of time—I speak of confession in general terms—any statement, written or oral of an inculpatory nature sought to be introduced during the trial

of the case must not and should not be introduced prior to the time that the government has independently and before this inculpatory statement is resorted to, has established in the record in the case elements constituting the corpus delicti, not beyond a reasonable doubt, not even to the extent of making a prima facie case, but they must establish in the record evidence, sound evidence from which an inference of the existence of every element of the corpus delicti as evidence. That we say clearly, in conclusion, the government has not done, even in a scintilla.

If your Honor will consider the state of this record as it is now, I am sure you can take no issue with me when I say that with respect to the crime charged in count 1 of the indictment the record now is void of any evidence establishing or tending to establish an agreement on the part of the defendant Hollifield to receive compensation from the defendant Opper for service of any kind whatsoever. There is likewise no evidence establishing or tending to establish that the defendant Opper did aid, abet, counsel, induce or procure the defendant Hollifield to do anything. Such is true as to count 2, such is undeniably true as to count 3 and count 4.

Now, as to count 5, the record is void of any evidence establishing or tending to establish any unlawful conspiracy of any character whatsoever between the defendant Hollifield and defendant Opper and there is absolutely no evidence whatsoever tending to prove commission of any of the 13 overt acts in the indictment.

On that premise and by virtue of these authorities, we conclude respectfully that our objection in this instance should be sustained and any further effort on the part of the government to offer, through the testimony of a witness, evidence of oral admissions or through the tender of a document to offer evidence of written inculpatory statements is premature and will continue to be premature until the government can say on the record: "By this and this we have established the elements of the corpus delicti and now, therefore, these statements become admissible in point of time and in point of substance.

I conclude now as to that point. Does the Court wish me to go forward on those other elements of severance or shall I wait for the government's reply?

The Court: Do you wish to be heard on this point?

Mr. Kelley: I meant to say and overlooked it, your Honor, that we have filed here and prepared a joint memorandum on behalf of both defendants, and it was understood between us that I should speak on behalf of both in this connection and I would like the record so to show.

The Court: All right.

Mr. Kelley: Counsel has just brought to my attention, your Honor, that he understands from counsel, I believe for the government, that as to the case in the 9th Circuit to which I adverted, the Adolfson case, that application for certiorari was made and that certiorari was denied. Now, I haven't researched that aspect of it and possibly the government has, but, of course, the mere denial of certiorari, unless it can be demonstrated this was one of the points upon which application for certiorari was denied would be meaningless.

The Court: Do you think the court would have denied certiorari if it thought there was a conflict?

Mr. Kelley: Many times application for writ of certiorari is made and the appellant will select one or two points which to him are important and ignore many others which were at issue below, and the denial of certiorari would be meaningless, unless it could be demonstrated that in the petition for the writ one of the claimed points of error was the decision on this point. I submit I haven't looked that up and we must not consider certiorari at all until that can be definitely demonstrated, if it can.

The Court: Pardon me. Just one second. Point 1 is on page 2. Point 2—

Mr. Kelley: Point 2 is at the top of page 3, your Honor.

The Court: Point 3 is on page 4.

Mr. Kelley: Point 4 is on page 7, your Honor. That is the last point. I forgot to say, it was my intention to express our thanks to this Court and to the attorneys for the government in letting us extend this time over from 11 until 1, and because we are rushed is the reason we did not affix an index to our memorandum.

The Court: It is quite all right. I want to give you all the time. I want to get the benefit of the law as counsel see it on both sides.

Now, perhaps we better hear from the government on this point and take up the other point later, if you care to do so.

Mr. Richter: May it please the Court, at the outset we would like to submit it is the position of the government that it is the understanding of lawyers generally that denial of a writ of certiorari does mean that there is no substantial error in the case.

Of course, the position of the government is based essentially at this state of the proceedings on the Adolfson decision. If that has been approved by the United States Supreme Court, we submit to your Honor that it is determinative of the issue immediately before the Court.

Briefly, however, we might direct the attention of the Court to the fact that the wording of the decision in the 9th Circuit, which counsel for defendants has cited to the Court is basically in conflict with the fundamental rule which the 6th Circuit has approved in the Anderson case, reported in 124 Fed. (2). I am going to give you the citation.

The Court: Do you have a memorandum?

Mr. Richter: No, I haven't a memorandum. We haven't a stenographer available and we haven't a written memorandum.

The Court: 124 Fed.

Mr. Richter: The Anderson case is reported in 124 Fed. (2) at page 58.

Now, if the Court please I might make that a bit clearer by directing the Court's attention to the fact that there are two conflicting rules relative to the admissibility, the fundamental admissibility of confessions under circumstances such as these. These two rules are as follows, and I am taking this from a memorandum which I can submit to the Court, which has been prepared in the Department of Justice. The first rule is this: "Any corroborating circumstances, independent of the confession, will serve, which in the judge's opinion go to verify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a burden of proof."

Now that rule has been enunciated by Justice Learned Hand in a decision in 250 Federal Reports, at page 566. That is the leading case on the so-called liberal rule for the introduction of confessions.

The second rule might be termed the strict rule. This rule may be summed up as follows: "There must be independent of the confession substantial evidence of the corpus delicti and the whole thereof, but such corroborative evidence need not establish the corpus delicti beyond a reasonable doubt."

Now, if the Court please, there are decisions on each side and there are many decisions of varigated shade in between. I think for the purpose of this motion that the Court will probably be interested in what the 6th Circuit Court has said and likewise perhaps what the 2nd Circuit has said, the New York Court.

In the 6th Circuit we have already cited to the Court the Anderson case in 124 Fed. (2), which without going into detail at this time, we submit does follow the liberal rule enunciated by Judge Hand in the New York decisions, 250 Fed., page 566.

So that I think we can state to the Court that the 6th Circuit and the 2nd Circuit are in accord in following the

rule, the liberal rule enunciated in the Daeche case in 250 Fed., at 566. Now, that being the case, if the Court please, there is a conflict between the language which counsel has cited from the 9th Circuit case, 111 Fed. (2) at 751, and the ruling in the 6th Circuit case. If we take the language from the 9th Circuit, quoting as follows: "It is, of course, settled that the confession cannot be admitted until the corpus delicti has been established", that is not true in the 6th Circuit.

So that the rule of procedure which counsel has enunciated to the Court as being in effect in the 9th Circuit is fundamentally in conflict with the law in the 6th Circuit. Therefore, we submit that the 6th Circuit should control.

Now, if the Court please, the basic distinction between these two rules, I believe, is this: In the liberal construction, the emphasis is placed not on the proof of corpus delicti, but is placed on proof of corroboration of the confession itself and that position has been clearly enunciated by a very recent case. In 192 Fed. (2) at page 574, that is the case of United States v. Markman et al. In that case the court emphasized the fact that the rule prohibiting the introduction of confessions except under proper circumstances is designed not so much to offer evidence of proof of the corpus delicti to complete the proof of t[he] offense, but is directed rather to corroborating the truth and the reliability of the confession.

The court in this decision and in some other decisions which we have seen refers to the fact that when you do introduce a confession, the confession is evidence of the corpus delicti. It is direct evidence of the corpus delicti. It is not merely corroborative evidence of other testimony in the case which goes to prove a corpus delicti.

Therefore, the purpose really is rather to corroborate the reliability and the truth of the confession and to insure that there hasn't been any untrue confession, or any confession which has been extorted by illegal means.

Therefore, we submit, if the Court please, that on the basis of the decisions, in the 6th Circuit in which this dis-

trict is located, which are in harmony with the decisions in the 2nd Circuit, the rule of procedure is in conformity with the substantive law on the subject, as to admissibility of these confessions, to the effect that it is not necessary in this Circuit to establish proof of corpus delicti and all the elements thereof in any respect, at any time, whether in the middle of the case or at the end of the case. Therefore, that in this instance it is entirely within the sound discretion of the court to permit this to be done, that the Court, we believe, may give some consideration to the fact that the government should be permitted to prove its case in such manner as it sees fit and that no damage can be done, if at the conclusion of all of the testimony the Court then decides whether or not, beyond a reasonable doubt, the corpus delicti has been proved, not only by the confession, but by any other evidence that might be in the case at that time.

The Court: Is it the thought of counsel that at this time the Court, without any indication, I understand that upon the part of the Court, without any indication on the part of counsel, that they are abandoning what they have already argued, is it your thought that you will present to me some arguments and authorities on this question of severance, in the event it should possibly be that the Court would overrule the objection?

Mr. Kelley: Your Honor, I understood that is what was desired.

The Court: I did say that. I still say so, if it is agreeable to counsel. My point is, in trying to save time both for the Court and counsel, as well as the jury running back and forth to the jury room every few minutes, in the event we go on with these matters.

Mr. Kelley: On the earlier point, your Honor, I do wish to request about one minute of rebuttal.

The Court: Oh, yes, certainly.

Mr. Kelley: And in a sense that comes very close to the matter now under discussion. Brother Richter cited the Anderson case in the 6th Circuit and he cited a case in which the decision was written by Justice Hand, 2nd Circuit. I suggest only that in citing those cases and the decisions in those cases, counsel is undertaking to assert what the law might be on the question of substance not of procedure. Those decisions may go to establish what might be the corpus delicti in a given case and the nature of corroborative evidence. I suggest that they are not in point on the immediate issue now being argued, that is, on the timeliness of introducing evidence from a procedural rather than a substantive standpoint. I had stated this in point 1 at the conclusion of point 1 in our memorandum, so there may be no misunderstanding what points we are covering in this argument which has been afforded to us: "The question of what constitutes"—that is at the bottom of page 2, the last paragraph under point 1—"The question of what constitutes corpus delicti."

At that time, we will meet the cases cited here, the Anderson case and Justice Hand's decision, and we will cite in turn many other cases on that point which we feel the Court should consider on that point.

That is all I wish to say in rebuttal.

Mr. Richter: I believe I have made my position clear, that the substantive point is definitely involved, not the procedural, on the basis of the language used by the court in the 9th Circuit, that the court in the 9th Circuit definitely states there must be evidence of proof of all points of the corpus delicti before you can produce confessions. Therefore, it doesn't apply to the procedural situation in this case. The 6th Circuit, if it wouldn't support that decision in substance, certainly wouldn't support it in procedure. The reason given in the 9th Circuit that you can't introduce confessions at any time is that you must, before you introduce evidence of confessions, prove the corpus delicti. Now, that is definitely opposed to the position taken by the 6th Circuit, which holds that it is not neces-

sary in any case to prove the corpus delicti independently of the confession.

Have I made my point clear?

The Court: Yes, I understand the point you are making.

Mr. Richter: Mr. Aug has directed my attention to this consideration, that since the Adolfson case has been definitely determined and approved by the Supreme Court, it is the law of the 9th Circuit as well as of any other circuits that might follow that and consequently the argument submitted as to conflict of decisions doesn't hold up. The Supreme Court has placed the seal of approval on the language of the Adolfson case.

Mr. Kelley: I don't want to go on ad infinitum. On that last question of what does "certiorari denied" mean, if the Court will indulge me to go back to the day when I argued before Justice Hand in New York, I quoted to Justice Hand a Circuit Court decision from his own circuit, an old case, so to speak, and I saw fit to remark that certiorari was denied and from that bench Justice Hand asked me whether or not the point under consideration here was a part of the petition for certiorari and told me if it wasn't the words "certiorari denied" had no meaning for him.

Shall I proceed to the other question then, your Honor? As I say, I don't know—and we shouldn't burden the Court—what was in the petition for certiorari. I shall endeavor to do that, if those books are available to me any place in the meantime. (Hands document to the Court.)

The Court: This has to do with the matter of severance?

Mr. Kelley: Yes.

The Court: If you don't think this is proper procedure, we won't follow it. But may the record show that, assuming without deciding anything.—I will emphasize that as much as I can. Assuming for the present purposes only that the Court would sustain the government's position.

Very well. Then counsel for defendants, as I understand, will rise and address a motion in the record that there be a severance in this case on behalf of one or both of the defendants and the defendants be tried separately.

Now, may the record show that for our present purposes, of course, solely, as among ourselves, not for the jury, that this is proceeding as if there was now before the Court a motion for severance and instead of arguing it Tuesday morning, when the jury gets back, you are going to argue it now and give me the benefit of your authorities and your briefs—your arguments and your briefs and your authorities, so I can have those over the weekend.

Now, may we assume that position for the time being in the record, if ever we should reach that stage, defendants might, even so, want to make a motion of that kind, as a matter of record, but instead of my having to hear it all again, if we should reach that stage, I can pass on it in the light of what has been said now. Is that satisfactory, Mr. Kelley?

Mr. Kelley: Yes, your Honor. It is manifest that we have an exact understanding of what you just stated in the first paragraph of our memorandum, in which I say: "If and when the Court shall rule that inculpatory statements, whether written or oral, made by the defendant Hollifield are properly to be admitted in evidence.

I think that is very clear to us.

The Court: Is that agreeable to you, Mr. Richter?

Mr. Richter: Yes, sir.

The Court: Very well. You may proceed accordingly.

Mr. Kelley: We will undertake in this connection to make three points. That is, when I say "we" now, as to this I am speaking solely for the defendant Opper, and counsel for the defendant Hollifield will follow me and speak for their client as to these matters.

The first point that the defendant Opper makes is this, and all of this, of course, is predicated upon the assumption only that the Court may permit these inculpatory statements, either oral or written, to go in. But should such occur and in the light of that happening the defendant Opper suggests to the Court now that he is informed and believes (1) that the government is in possession of a written, signed and sworn statement by the defendant Hollifield embracing inculpatory admissions, not only as to the offenses charged in the indictment, but also with respect to divers other offenses or incidents or events to which he was a party, not related to the instant case, or the facts of the instant case.

Do I make myself clear, your Honor?

The Court: Yes.

Mr. Kelley: And secondly, we are informed, or at least we believe and assume that the government proposes before offering such a written statement of Hollifield in evidence in the case to obliterate all references in such statement to matters which the government believes are not relevant to the subject matter of the instant case.

Now, should such event occur, the defendant Opper contends that he should be entitled as a matter of right to examine such written instrument in its entirety, in order that he and his counsel might determine for himself whether or not the matters which the government would obliterate are, in fact, irrelevant to the subject matter of the instant case and I presume that would be a matter which the Court himself would wish to look into before approving any obliteration.

We say in this connection, the defendant Opper concedes that totally irrelevant matter should be deleted from such an instrument, but as we set forth in the following point that the name of Opper should likewise be obliterated and deleted therefrom.

What I have just stated constitutes point 2 in slightly enlarged language, to this effect, "Should any written in-

culpatory statement by defendant Hollifield be received in evidence during the joint trial of these defendants, it is submitted by the defendant Opper that his name should be obliterated or deleted whenever and wherever it may appear."

Our position is identical as respects testimony from any investigator purporting to give the substance of conversations with the defendant Hollifield wherein the name Opper may appear.

Our point 3 is this, that should the Court reject—again we are looking into the future possibilities, with the hope that this occasion will not arise, but should the Court reject aforesaid contentions, defendant Opper in such event, shall desire, in the light of that ruling, to renew his motion for severance based upon the grounds stated in his earlier motion for severance presented and argued here on the 24th of April this year and upon the additional decisions in this memorandum cited. I don't believe any good purpose would be served, your Honor, in my undertaking to read now from those decisions. Our position, I think, is elementary and clear. With that I will close. Copies of this have likewise been furnished to the government.

The Court: Do you wish to be heard?

Mr. Meyring: May it please the Court, we have a motion for severance which is prepared to be filed for the defendant Hollifield at the proper time and we have a memorandum that is now being prepared, which we want to submit to the Court, either this afternoon or sometime in the morning, at the Court's pleasure. Shall it be delivered here, your Honor, or to your home? We just didn't have the time to get it prepared to submit it today.

The Court: Better leave it with Miss Boyd in the clerk's office.

Mr. Meyring: We will deliver it out to your home, if you so desire.

The Court: No. I will have to come down here and do this work. I don't have all these books out at the house. There will be somebody in the clerk's office until 12. If you don't deliver it by 12, there is no use to bring it over until Monday. If you have it here by 12 tomorrow morning, give it to Miss Boyd. It isn't necessary to file it. Miss Boyd, just hold it for me.

Mr. Meyring: All right. On the memorandum with reference to the motion for severance, as has been stated, if and when the Court shall rule that inculpatory statements, whether written or oral, which were made by the defendant Opper, are presented and are properly to be admitted in evidence in this case, then the defendant Hollifield will be heard in respect to the following propositions: (1) The defendant Hollifield is informed and he believes that the government is in possession of a written statement or oral statements which they can produce by testimony, taken from the defendant Opper, which embrace admissions, inculpatory admissions against the defendant Hollifield, which refer to the crime or crimes charged in the indictment. So, should any written statement by the defendant Opper be received in evidence during the joint trial of these defendants, it is submitted by the defendant Hollifield that his name should be obliterated from any such statement.

The Court: You are talking about any statement by Mr. Opper.

Mr. Meyring: Any written or oral statements made by Mr. Opper to any representative of the government or the F. B. I. or O. S. I.

The Court: About Mr. Hollifield.

Mr. Meyring: About Mr. Hollifield, yes, sir. And should the Court reject this contention of the defendant Hollifield, then we will file this motion for the severance and cite decisions which we will present to the Court tomorrow morning upon grounds to be stated at a later time.

Now a point to be made, your Honor, is that the prejudice to the defendant Hollifield which must come from the receipt of evidence of an inculpatory nature made by his co-defendant Opper, wherein the name of Hollifield appears, is directly comparable to the prejudice which attached to the plaintiff in the case of United States v. Hale, which case is cited or will be cited in our memorandum, your Honor, the same as it is in the memorandum for Opper. In this case Hale was denied severance from his co-defendant and in reversing the decision of the District Court, the 8th Circuit Court of Appeals stated: "It is necessary therefore to determine whether the confession of Ramsey, one of the defendants, as introduced was necessarily prejudicial to the plaintiff and whether in view of the fact that its introduction was anticipated, the motion for severance should have been granted. Connection of Hale with the crime rested almost entirely upon the testimony of Burkham, himself a confessed criminal and a man of bad general character. It is debatable whether the confession of Hale would have resulted from his testimony in the absence of strong corroboration contained in the Ramsey confession. But concededly the confession of Ramsey was incompetent to bind Hale."

That is our position in this case. It is conceivable now and perhaps indicated that the government is attempting or will attempt to introduce written or oral statements or confessions made by the defendant Opper, which include the name of the defendant Hollifield. As I say, your Honor, that is the case of Hale v. United States, 25 Fed. 430. The principle involved in that case, your Honor, upon which the defendant Hollifield's contention is based has long been established in the common law and followed by many judges throughout the various state courts.

There is another reference which will be cited, People v. Buckminster, 113 N. E. 713, an Illinois case decided in 1916. In this Buckminster case, Buckminster and Friedman and Fink were indicted for arson. Fink confessed and he testified at the trial that he had confessed and

the state's attorney introduced his confession, only for the purpose of impeaching him, because previously it had been ruled that the confession was not voluntary. Buckminster objected to the introduction of the confession insofar as it related to him, but it was admitted for that purpose and the jury was instructed not to consider it in determining the guilt or innocence of Buckminster. Buckminster was convicted and he appealed and the court said in one part of its decision: "Our attention has not been called to any case in the briefs and we know of none where this precise question under the circumstances shown in this record has been passed upon. But on reason and by application of the principles that have become settled by law by other decisions we cannot see why the criminal law cannot be more justly and wisely enforced by holding that the part of the confession which affected Buckminster should have been refused admission. The reading of this confession admitted in evidence shows clearly that Fink had confessed his own guilt before he said anything as to Buckminster being connected with the crime." And the court then held that the trial court should have sustained the plaintiff's objection to the introduction.

Another case which is in accord with the Buckminster holding, 152 N. E. Illinois, 1926, Miller v. People, 55 Federal (2) 320.

Now, your Honor, while it may be presumed that the Court will instruct the jury that such statements, inculpatory statements and admissions may not be considered in determining the guilt or innocence of this defendant, this moving defendant Hollifield, nevertheless, your Honor, the likelihood remains that such instructions might confuse the jury. The instructions might be misconstrued by the jury, or the jury might inadvertently ignore such instruction, which, of course, will be to the prejudice of this moving defendant Hollifield.

Now, your Honor, thank you for your indulgence and we will see that this memorandum is presented to you not later than 12 o'clock tomorrow morning.

Mr. Richter: May it please the Court, on the subject of severance, we haven't had an opportunity to go over counsels' brief thoroughly. However, again, we submit to the Court that a decision in the 6th Circuit is of greater interest than those from other circuits, and we believe that this question is controlled by a very recent decision of the 6th Circuit Court of Appeals, Sharp v. U. S., No. 11379, decided on April 17, 1952. I don't have that decision with me but I might read some notes that I made, which, of course, the Court will desire to verify at his convenience.

In this Sharp case there was a motion for severance on the ground that the co-defendant had made certain statements intended to implicate the appellant, which when introduced in evidence would create an ineradicable prejudice in the minds of the jurors in their consideration of the guilt or innocence of the appellant.

The court in denying the motion quoted from Judge Augustus N. Hand in the case of U. S. v. Cohen, reported in 124 Fed. (2) 164, at page 166. Certiorari denied 315 U. S. 811. And we quote: "It is common in cases of joint indictments that there is hostility of some of the defendants to the others and that they will try to save themselves by placing the blame on associates in the crime. The jury can and does weigh the inducement of some defendants to implicate others in determining guilt. We find no error in the disposition of the motion to compel a severance and hold that the order denying it should be affirmed."

The 6th Circuit Court of Appeals thereupon says, "It was correctly stated that the granting of the motion by one of the defendants jointly indicted for severance and separate trial is ordinarily within the discretion of the District Court." Of course, the discretion of the District Court depends on Rule 14, I believe, which gives the Court the power to decide in matters of that kind.

Now addressing ourselves to the question of the obliteration of the names of the two defendants from the respective confessions, I don't believe that counsel verbally or in their memorandum have cited any authorities on

that subject. We submit to the Court, it is our view that the name of a person mentioned in a confession, other than the confessor, is certainly a relevant part of the confession and that matter, of course, could be determined upon presentation of the confessions to the Court and discussion by counsel. We certainly feel that if the names of these defendants were obliterated, the meat of the confession would no longer be there; they would be deprived of the power and effect which they naturally should have, and these names are clearly relevant portions of the confessions.

Other than that, at this time, we have nothing else. Perhaps, if the motion should become active at a later date, it might be in order to submit a reply memorandum.

Mr. Kelley: I have only one word of rebuttal to utter, that is, that we, of course, concede that the issue on a motion for severance rests in the judicial, sound discretion of the judge. That is elemental and always has been. I only say in passing that if there are actions which warranted the exercise of that discretion in favor of defendant every time, we might as well wipe that out of the rules; no use to have it. We submit this is a case warranting the exercise of that discretion in the interest of justice for the defendants.

The Court: Anything further?

Mr. Svoboda: Nothing further.

The Court: Except to get the brief of counsel for Mr. Hollifield, which will be left with the clerk tomorrow, I understand the case on these matters is now submitted to the Court. I am going to adjourn court until Monday morning. This case, you understand, is going over until Tuesday morning. I so instructed the jury. I don't want you to get confused about it. The court goes on even if the case doesn't. So, I will adjourn court now until Monday morning, at 11 o'clock and recess the further hearing of this case until 11 o'clock on Tuesday morning.

Thereupon the further proceedings in this case were adjourned until 11 o'clock Tuesday morning, court being adjourned until Monday morning.

Morning Session.

Tuesday, May 20, 1952.

Court met pursuant to adjournment. Counsel being present as heretofore noted, the following proceedings were had out of the presence of the jury:

The Court: Do counsel wish to be heard further on any matters pending before the court, before I proceed? I assume not.

Mr. Kelley: Well, if your Honor please, I hate to keep an argument going forever, but since I had the opportunity to discuss this question with the Court last Friday, there has occurred to me a fact that one further cogent reason why, in exercising its discretion as to when evidence of this character ought best to be admitted, if at all, this other factor occurred to me, that should the Court permit inculpatory statements to go into the record in the case upon the expectation that later on in the government's case it would introduce independent corroborative proof sufficient to render the statement admissible, I suggest that the better practice ought to be for the further reason not to permit introduction of the inculpatory statement until the Court is satisfied that sufficient corrborative proof of corpus delicti is already in the record. And that record is this, further relying upon the government's assurance or expectation later on to put in corroborative proof and when the government closes, should the Court then with all the record before it decide that there is not sufficient corroborative evidence to have warranted the introduction of the confession, then the Court would, of course, strike it out.

However, in striking it out clearly such prejudice would have resulted to the jury then that in all probability the

Court would be impelled to declare a mistrial. I suggest that also as a cogent reason why it would be the better practice to allow the government to put in all the proof, to avoid a mistrial in the event the Court would ultimately rule it should not go in.

The Court: Does the government wish to be heard?

Mr. Richter: If the Court please, that, of course, is a consideration which the Court in the Adolfson case undoubtedly had before it. We submit to the Court that is an argument which could be in any case of this kind and if a rule has been established that these statements may be introduced at any time, we believe that the argument presented by counsel in this instance has no form. In other words, we are standing upon the rule as enunciated in the Adolfson case.

Mr. Kelley: Did you receive our additional memorandum?

The Court: Yes, I received that and I will not in my decision of this matter—I am not going to take into consideration the question of whether or not the Supreme Court denied certiorari. I think that adds nothing to the matter one way or the other.

Now, Gentlemen, of course, I have had in mind the very point that counsel for defendants make and it is one of the serious matters that has weighed heavily with the Court ever since we started to talk about this matter. However, I will proceed to decide the matter as I think it is proper under the circumstances. Of course, if I am in error, it is to be regretted in this and in every case where the trial court has a mistaken view of the law. It is always unfortunate for all parties.

Let the record show, please, as no doubt it does that what I am saying and what counsel have said and all that has been taking place here this morning is in the absence of the jury and will continue to be in the absence of the jury unless and until your record shows affirmatively that the jury is ordered back into the court room.

On Thursday afternoon of last week, May 15, 1952 the government called the witness Noble. His preliminary examination showed that he is a special agent in the Procurement Section of the Office of Special Investigation, Inspector General of the Air Force, and as such he was asked whether he knew the defendant Hollifield. The witness said that he did. He further testified that together with another special agent by the name of Collins they had had a conversation with the defendant Hollifield, in the office of Special Investigation, on September 26, 1951. Thereupon the Assistant United States Attorney, on behalf of the Government asked him the following question: "Will you relate to the Court and the Jury the preliminary discussion that you had with Mr. Hollifield on that occasion?" Counsel for each and both of the defendants objected to the witness proceeding to relate the conversation to which he had referred.

Before there was any further discussion with reference to the matter, the Court asked the Jury to retire to the jury room and thereafter all proceedings had were and have been in the absence of the Jury.

It was suggested by the Court and agreed to by counsel for the Government as well as for the defendants, repectively, that the legal questions involved in the admission at this or any time of any conversations or confessions, so-called, might well be heard and disposed of at this time rather than to have an objection entered to each and every question, during the progress of the trial before the Jury.

Counsel for defendants stated that they would like an opportunity to be heard fully and in addition to that to file briefs in support of their contentions, together with the authorities upon which they rely. This suggestion, too, was satisfactory to the Government and quite agreeable to the Court.

Thereupon, the Jury was ordered back into the court room and were instructed that they were at that time excused and not to return to the Court House until today, Tuesday, May 20, 1952.

After the jury had retired counsel for defendants requested that they be given until the next day, that is, Friday, May 16, 1952, in which to prepare their briefs and at the same time present their oral argument. This arrangement was agreeable to both the government and the Court.

On Friday, May 16, 1952, counsel representing both of the defendants filed a memorandum in support of their objections and at the same time argued the points at issue orally.

The Government's counsel stating that they had not had an opportunity to answer the memorandum filed on behalf of the defendants, stated that nevertheless they could present their views and authorities by way of oral argument, which they did. After counsel for the respective parties and for the defendants respectively had been heard the questions at issue were submitted to the Court for its determination.

The cause is now before the Court, therefore, on the objection of defendants to the admission of the testimony of the witness Noble, tendered last Thursday afternoon.

In his oral argument on last Friday, Mr. Kelley, counsel for the defendant Opper, but in this instance speaking, as he stated and the record shows, on this particular matter, on behalf of both defendants, made the following statement: "* * * * Now, in the memorandum which you have, we have confined ourselves to one issue and that is the timeliness of the Government's offer of evidence of this character. In other words, is the record now in such a state, has sufficient been established in support of the indictment as of this time, that under the decisions it would be proper to admit an inculpatory statement? We say that that is not the case, that there has not been sufficient evidence introduced into this record, as of this moment, as to constitute a foundation or predicate for the introduction of any inculpatory statement."

It is the contention of the government that the time of introduction of such evidence as is now here objected to

is not important in relation to the proof of the corpus delicti.

In connection with their oral arguments and in their memoranda filed with the Court numerous authorities are cited by counsel to sustain their respective contentions. For the present purposes, however, the Court thinks it is unnecessary to deal with but a very few of these authorities which are particularly stressed.

The Court's attention has been called to two cases, both decided by the 9th Circuit Court of Appeals. The one Quong v. U. S., 111 Fed. (2) 751 decided on April 29, 1940. In that case the Court of Appeals quite definitely stated, on page 756, that "It is, of course, settled that the confession cannot be admitted until the corpus delicti has been established."

Subsequently, however, in the case of Adolfson v. U. S., 159 Fed. (2) 883, the same 9th Circuit Court of Appeals, on February 6, 1947, as distinctly held that,—reading first from the head note—"The order in which evidence to prove corpus delicti is to be received is not important and is largely a matter within the discretion of trial court and if proof in the nature of independent corroborative evidence supports introduction of confession, the time of introduction of such evidence is not important, but it is sufficient if such evidence is forthcoming at some point in the trial."

And in the decision or opinion, it is at page 887 and 888, the Court say, "All of this is made more apparent by the fact that on May 25, 1945 appellant freely and voluntarily made a written statement in the nature of a confession in the presence of a San Francisco police officer and a member of the F. B. I. The confession was introduced in evidence over the objection of the Appellant that the corpus delicti, that is, the knowledge required by Section 87 had not been established by independent evidence and, therefore, the document was incompetent, irrelevant and immaterial. We think the government did show corroborative independent evidence tending to prove the corpus

delicti and to verify the truth of the written confession it was properly admitted." Citing authorities. "The order in which evidence to prove the corpus delicti is to be received is not important and is largely a matter within the discretion of the trial court."

Neither of the foregoing decisions are controlling upon this Court. This Court is bound only to follow the law as laid down by the Circuit Court of Appeals of this (6th) Circuit and the Supreme Court of the United States. However, decisions from other circuits should always be considered by the Court and many times are most persuasive.

In the present instance where there appears to be some conflict between the decisions in the 9th Circuit, this Court must consider that the Court of Appeals of that Circuit had notice of all of its decisions prior to the one in the Adolfson case on February 6, 1947, and that in deciding the Adolfson case that court took into consideration what had also been decided by the same court in an earlier decision.

A very recent decision in the case of U. S. v. Markman, decided as late as January 14, 1952, this Court thinks throws a great deal of light on the admissibility of the testimony now objected to and has helped the Court reach its final conclusion. In that case, decided by the Court of Appeals of the Second Circuit in New York, the court held "The purpose of the rule requiring corroborative testimony is only to guard against convictions based on an untrue confession and its function is not so much to give evidence of defendant's guilt as to supplement his confession to that effect." And in its opinion on page 576 the court said: "Whatever may be the rule elsewhere we have held that the extra confessional proof required need not itself preponderantly establish the guilt of the defendant. If it shows by independent facts that the crime has been committed against which the jury can measure the reliability and consistency of a defendant's own statement this is enough. The purpose of the rule requiring corroborative testimony is only to guard against convictions based

upon untrue confessions. Its function is not so much to give evidence of the defendant's guilt as to supplement his confession to that effect." Citing numerous authorities.

This very recent decision by the Court of Appeals of the Second Circuit is in keeping with an earlier one by that circuit, in the case of Daeche v. U. S., 250 Fed. 566, decided March 14, 1918. That case was decided by no less a distinguished jurist than Judge Learned Hand. There it is stated "While some sort of corroboration of a confession is necessary to a conviction and that rule prevails in the Federal Courts, the corroborating circumstances need not be seen in themselves to establish the corpus delicti, either beyond a reasonable doubt or by a preponderance of the evidence."

Both of these decisions are in keeping with a decision along these same lines and bearing upon the question now before this Court by the Court of Appeals of this (6th) Circuit, in the case of Anderson v. U. S., 124 Fed. (2) 58. In that case the Court of Appeals of this circuit said: "The admissibility of a confession is necessarily addressed in the first instance to the District Court. A confession if freely and voluntarily made is most satisfactory type of evidence and it is deserving of the highest credit inasmuch as it is presumed to flow from the strong sense of guilt and therefore it is admitted as proof of crime to which it refers." And on page 66 of the opinion the court says, "If there is in the evidence, in addition to the confession circumstances which although they may be susceptible of an innocent construction are nevertheless calculated to suggest the commission of a crime and for the explanation of which the confession of the particular defendants furnishes the key, the case cannot be taken from the jury for failure to show corroboration. All that is required is that there be such substantial corroborative circumstances as will, when taken in connection with the confession, establish the corpus delicti beyond a reasonable doubt."

The matter before this Court now, however, is a procedural matter, and a procedural matter in a criminal case

at that. As stated by counsel for defendants themselves in their brief, "The issue is directly concerned with the order of proof." This Court is not bound by the decisions of the state of Ohio on questions of procedure. The rules applicable to civil cases where substantive law is involved are not applicable on questions of procedure in the United States Court and least of all in criminal cases where the court follows the Federal Rules of Criminal Procedure.

Upon a complete consideration of the briefs and arguments of counsel, the authorities cited and with a full sense of the responsibility which rests upon this Court in making this ruling, the Court is of the opinion and so finds that the objection is not well taken and that it should be, and it is overruled, and all of the testimony about to be offered, unless subject to some specific objection, will, of course, be admitted.

Now, Gentlemen, before calling back the jury, if there is any further procedure which the defendants would like to take and indicate they would like to take in their brief, I, of course, would like to give them an opportunity. Both defendants have indicated if we reach the stage we have now reached, they may want to do something further and I want them to have the opportunity to do that.

Mr. Kelley: Well, your Honor, I do not wish to be impertinent, but are we properly to understand that your Honor's decision just announced is limited to the question that we stated in our brief, merely the order of proof and the timeliness of this offer as opposed to whether or not the Court is ruling as to how much, if any, independent corroborative testimony may be needed ultimately in the case as a whole to justify admission of the confession?

I mention this only for this reason: We stated in our briefs that we were addressing ourselves solely to that question of the timeliness, with the thought that now the Court has ruled at the close of the government's case, we, of course, would appreciate the right to be heard on the question of how much, if any, and of what character must the corroborative proof be to consider it. It is my impression that is still a matter on which we may be heard.

The Court: All I can say is, it is the opinion of the Court that there is sufficient in the evidence at this time to justify introduction of these admissions, or perhaps, so-called confessions, if you reach that stage.

Mr. Kelley: Then we come to the next question. We have indicated to the Court that we would desire and do now move on behalf of the defendant Opper that as respects any testimony of the witness presently called to the stand, the same to apply to any subsequent witness who will testify to conversations of the same character, that the Court do not permit and by proper order shall instruct the witness that as to any conversations had with the defendant Hollifield and as to any written statement which he may have obtained from the defendant Hollifield and which he may undertake to identify, that the name of Opper be obliterated or deleted therefrom.

The Court: Yes. I will overrule that.

Mr. Kelley: Upon the basis of the two rulings just now made on behalf of the defendant Opper, we move for a severance upon the grounds heretofore argued last Friday.

The Court: I think the other counsel want the same kind of motion.

Mr. Meyring: We have our motion for severance, your Honor, that we will file if the Court ruled as it did this morning on the subject. That is a similar motion, your Honor, to the other.

The Court: I think it might be well, Mr. Meyring, if you would be kind enough to read that into the record so we will have it in our present record and also at the same time probably or during the day file it in the office of the clerk, so it will appear both places.

Mr. Meyring: "Motion for Severance under Rule 14. Now comes Robert George Hollifield, Sr., one of the defendants herein by his undersigned attorneys and moves the Court to grant a severance to him in the above entitled

case." That is signed by Frank J. Svoboda, Jr. and Arthur W. Meyring, Attorneys for defendant Robert George Hollifield, Sr. I will—

The Court: Defendant Opper moves and has heretofore moved for a severance in this case. In the light of the Court's ruling just made defendant Hollifield now also moves for a severance in his own behalf. This matter was argued to the Court on Friday of last week. Later the Court was supplied with authorities on behalf of both of the defendants as to why the motion on behalf of one or the other should be sustained. The motions were argued orally also on behalf of the government.

The cause is now before the Court on these motions. The question of whether or not there should be a severance in this or in any given case has been decided so very recently by the Court of Appeals of this Circuit as to need the citation of no other authority. The question was decided by the Court of Appeals of this 6th Circuit on April 17, 1952 in the case of Sharp v. United States. The only document I have with regard to it is the advance printed copy of the decision. The court was comprised of Judge Simons, Chief Judge, Judge Allen and Judge Martin. The decision was by Judge Martin. It may now appear in the Federal Supplement, the early reports of the Federal Supplement. I am not sure. I haven't looked it up. At any event, the Court of Appeals held in that case that the granting of a severance is a matter entirely within the discretion of the trial court and in so refusing the court commits no reversible error, unless the trial court abuses his discretion.

It is the view of the Court that in such a case as is now before the Court to require a severance, would defeat the very ends of justice; that is to say, these defendants are charged with having committed the offense of giving and receiving a bribe under the bribery section of the United States Code, Section 281, Title 18. It is impossible for one of the defendants to have received or to have agreed to receive the alleged bribe and it is impossible for the other

defendant to have given or agreed to give the alleged bribe without the presence of the other. It takes two to perform a complete offense charged, that is to say, the briber and the bribee.

The section of the United States Code herein charged to have been violated is entirely independent of the so-called gratuities section to which Section 1584, Title 22, under which the Razette and Kratz case was recently tried and the defendants convicted in this court.

There are no doubt many cases in which a severance should be ordered and some of these cases are referred to in the briefs of counsel. One for example is the Buckminster case, 113 Northeastern, 713, wherein the parties were indicted for arson. However, the offense there charged, and in these other cases, was so foreign to what is before the Court in this case as to make the authorities of no control or even persuasive effect.

The Court is of the opinion and so finds that the motions for severance and each of them, on behalf of the respective defendants, is not well taken, that each respectively should be and hereby they are overruled. The case will proceed as against both of the defendants jointly, as it has been from the beginning. I have already ruled on the question that there would be no deletion from the confession, so-called, of either one of these defendants. That also was argued before the Court and briefed by counsel. Of course defendants are entitled to and the record may show that they have their exceptions to all these findings and rulings and orders of the Court and to each and every matter herein ruled upon.

Mr. Kelley: Would you hear me briefly to make my record?

The Court: Oh, certainly.

Mr. Kelley: I conceive that in the event this case should ultimately reach the Court of Appeals and at that time if it should appear that any remarks of this Court would indicate that this Court was laboring under a misapprehen-

sion as to the exact nature of the crime charged in this indictment, as I respectfully believe the Court is, I think the Circuit Court would turn to me and say, "Did you bring that matter to the Court's attention when it appeared to you that the Court was of the opinion that this trial involved a different crime than the one named in the indictment?"

For that reason, your Honor, I merely wish to suggest this fact, it is our understanding that this indictment counts 1 to 4 is not laid under the bribery statute, which I believe is section 201, that this is a statute wholly apart from the bribery statute. I suggest that the defendant Opper, for whom I speak now, is in no sense charged criminally with giving anything. Each of the four substantive counts is laid exclusively as to Hollifield under Section 281 of Title 18. That is to say, that he is charged with having received, the defendant Hollifield is charged with having received compensation for the performance of services. At the conclusion of each of those counts the defendant Opper is charged with having aided and abetted and counseled the defendant Hollifield to commit the crime which it is alleged Hollifield committed. There is a very substantial difference in the elements of the crime under the bribery statute and under this statute, of which at the proper time we would want to be heard more.

My only purpose in this statement is to demonstrate that at this time we undertook to point out to the Court that this is not a trial of the defendant Opper under the bribery statute, nor is it a trial of the defendant Hollifield under the bribery statute.

The Court: Well, I would like the record to show that count 1 of the indictment doesn't charge the giving or the receiving by either one of the defendants in this case of anything. What it does charge is that Hollifield did directly agree to receive from Opper $1750 as compensation for the rendition of services, and defendant Opper is charged that he did aid and abet and counsel, induce and procure Hollifield unlawfully to agree to receive said compensation.

I shall charge the jury, if we reach that stage in this trial that in count 1 of the indictment it is not necessary that any compensation ever passed between one or the other of these defendants. The offense is and the statute so states in so many words that it is an offense to directly or indirectly agree to receive compensation. So that if they agreed to it, it is not material so far as count 1 is concerned whether any compensation was ever actually passed from one to the other. That is not true, of course, in counts 2, 3 and 4, in each of which, respectively, it is charged that the defendant Hollifield did receive compensation and in each count respectively that the defendant Opper aided and abetted in the receipt by Hollifield of the moneys or compensation charged in each one of the indictments.

Now, it is my view that a rose by any other name smells as sweet. I have reached the conclusion that all the time talking about gratuities in these matters, we are commencing to get away from the idea that after all it is founded on the idea that somebody agrees to, or as charged in the other counts of the indictment did pay certain money and somebody else did accept it, and I think that is what the government means, and I think that is what Congress meant when they passed a law of this kind. I don't think they meant it to be a gratuity like you give a tip to a waitress who waits on you at the lunch counter, or something of that kind. No. In the first instance, the defendant Hollifield or the defendant Opper alone could not have committed these offenses. The offense charged as an offense against the defendant Hollifield—Hollifield is the man who violated the statute No. 281 and defendant Opper is not charged with having done that and he couldn't be because that applies to a person who is an officer or employee of the government of the United States. But when you turn to Section 2 of the United States Criminal Code, then it says, "If anyone did aid, abet, counsel, induce or procure" somebody else who is an officer to violate the law, then he becomes a principal. In other words, it does

away with the aider and abettor idea. He becomes a principal and therefore, as such, he is a principal who has violated Section 281 by aiding and abetting the other man who falls under that section.

Now, that is my view of it Gentlemen and I am very glad to have your view in the record and mine. If the Court of Appeals thinks I am wrong about it, of course, they will say so. But I still believe when you violate these sections, it means in the final analysis to what is known in common language to the ordinary man as bribery. I don't think it means gratuities at all. That is my opinion.

Mr. Kelley: Would the Court indulge me for a further word?

The Court: Oh, certainly.

Mr. Kelley: Your Honor, I am in hearty agreement with precisely what you have said, on the theory of the facts charged in the indictment anyone exercising common sense would say, here the government is undertaking to charge facts that amount to bribery; that here is the giver and there is the receiver. We protest that they did not use the statute for bribery in charging these men. There is a United States statute for bribery and clearly, in the name of common sense, the facts alleged here should have prompted the use of that bribery statute where these elements are present in the statute and all must be proved. An injustice has been done, if the facts are proved which would be bribery by not charging it under that statute. To undertake to look to some other statute where the word "intent" is not found in the statutory language and thus select that where the proof is not so severe on the government. To suggest that a giver would aid and abet the receiver in receiving, I agree with your Honor on that.

The Court: Where you and I differ, Mr. Kelley, is this: The government brought this indictment under a law, a statute which provides for exactly what is charged in this indictment, Section 281, plus Section 2.

When I say bribery is involved, I am not meaning that a technical case of bribery as made out under the bribery section is charged here. What is charged here is a violation of a law that is very plain, if anybody will stop to read it.

What I am meaning to say is, when you get all through with all of the talk about the thing, that it comes down to the final analysis of what the ordinary man feels and has a right to feel, and what I think Congress felt was that this is in effect bribery, not technically, maybe, no. Maybe it doesn't violate technically some other section of the Federal Code, they having put in all kinds of sections in order to cover all kinds of situations.

But this indictment charges the violation of Section 281 and of Section 2. While it isn't perhaps bribery, under some other section, the effect of it is, when you get through, in my opinion, the same effect as if it was a matter of bribery.

Now, I think it takes two people to do what is charged in this case. Consequently, it is not a case where there should be a severance or a deletion. Whatever is said here, I will instruct the jury, as best I can. If the jury doesn't follow my instructions, that, of course, I can't help. But I will instruct the jury what Mr. Hollifield has said about Mr. Opper must not be considered by them as against Mr. Opper. What Mr. Opper has said about Mr. Hollifield, if anything he did say, must not be considered against Mr. Hollifield. That is the only thing the Court could do is to preserve the record in that respect. But I don't think that as a matter of law that it is possible to sever these defendants. If I should grant both of their motions, incidentally, I suppose that would be the end of the case, because if each of them is going to have the severance from the other, how are you ever going to proceed any further?

Be that as it may, Gentlemen, I would like to have a distinct understanding about this before I call in the jury. I approached this matter last week and I have worked on it over the week-end and I have felt the responsibility

that goes with my decision, because I understand what it means both as a practicing lawyer for many years and many years ago as a prosecuting attorney of this county. I never quite reached the height of a District Attorney. But in any event, I was prosecuting attorney for a while. So, I understand the importance of this matter. I understood and it is my understanding now when this witness Noble is recalled, if he is, that then as I indicated in my earlier decision, unless there is some specific objection to some particular thing that we were going to go ahead now and take his testimony and the testimony of the man Collins, if he should be called, without any further objection upon the part of counsel.

Now, of course, I understand that sometimes there is a specific objection comes up as to a particular matter and that, of course, I would not expect counsel to waive. But generally speaking, I understood I am passing on all these questions so we can proceed with the jury without any further interruption, with the record showing, of course, that counsel for defendants and the defendants have entered their objections to everything that is being said and everything that has been testified to, all the rulings of the Court and everything. I understand that. Is that your understanding in the matter?

Mr. Kelley: Yes, it is, your Honor, fully and entirely. I only want to make sure that the record demonstrates that our objection goes to all testimony from this witness, from which he undertakes to develop an admission of an inculpatory nature. Other than that we will not reiterate these objections.

The Court: That is correct. You have an objection. The record may so show counsel object to every question and move to strike out every answer and I overrule the objections and the motions to strike as against both and each defendant, because I have done that generally, and I understood that was the end we were working to, in order that we could go on with our trial, with the understanding

further that upon some particular matter counsel for either one or both of the defendants wish to enter a specific objection, of course, you have the right to do that. Otherwise, we won't have to take any further time to the discussion of these matters. Now with that understanding—Did you wish to be heard?

Mr. Richter: There is a secondary question involved here and that relates to certain parts of these statements which counsel for defendants might object to, or which the government might not care to present. It might be in order at this time to consider the contents of these confessions and determine just what may or may not—

The Court: No. There is nothing more for the Court to determine, Mr. Richter.

Mr. Richter: I see.

The Court: I thought I had made that plain. I have said that you may go ahead on behalf of the government and offer whatever it is that the government claims they have the right to offer by way of admissions or confessions, or whatever you may wish to call them. If there is part of it you do not care to offer, I don't know anything about that, I don't care to know anything about it. It is only what you do offer that the Court is interested in. I ruled on that earlier. I thought I did. I meant to anyhow. You go ahead. There will be no deleting of any names, so far as the Court is concerned. If the government only offers so much, then when we come to cross-examination, if they wish to, they may ask about something further. I have no objection to that.

Mr. Richter: I see.

The Court: The government may offer what the government wants to offer. Mr. Noble may take the stand and say, "The only thing we talked about was it was a nice day," which would be a rarity around here. That may be all there is to it. I haven't the faintest idea what you are

going to offer. You may offer whatever the government feels they wish to offer. If you want to leave part of it out, that is your business. I haven't anything to do with that, and I am not going to rule on it. You may put it all in as far as the Court is concerned. But if the government thinks part of it you should not put in, you don't have to offer that in evidence, but the other side may cross-examine about it, as far as they wish, if it is a proper thing to do. Do I make myself plain?

Mr. Richter: Yes, your Honor. I hadn't understood you correctly.

The Court: Now just a second. We will take a recess for just about five minutes until I get rid of these books. Then we will call in the jury.

Thereupon a short recess was had.

And thereupon the jury returned into the court room and the following proceedings were had in the presence of the jury:

The Court: Counsel may proceed.

Mr. Richter: Call Mr. Noble.

And thereupon

MR. MONCURE NOBLE resumed the witness stand and testified further as on **direct examination**, as follows:

By Mr. Richter:

Q. Mr. Noble, Thursday, I believe, last Thursday, you testified as to a conversation you had had with the defendant Robert Hollifield. Do you recall the date which you stated that conversation took place?

A. Yes. That was on the morning of the 26th of September.

Q. What year?

A. 1951.

Q. Will you relate to the Court and the jury the preliminary circumstances that occurred just prior to your discussion with him?

A. At 8:30 in the morning, I called Mr. Hollifield at his office at the Aero Medical Laboratory and asked him to come over to my office, that is, the office of the O. S. I., I wanted to talk with him and he agreed to come over and he arrived at about 9:30 in the morning, and upon his arrival at the office of the O. S. I., I directed him into an interviewing room and introduced myself and Mr. Collins, Lawrence Collins, another special agent, and after the introduction I informed Mr. Hollifield that I wanted to question him in regards to allegations I had received during the course of the investigation, which indicated that he had received gratuities and moneys from various contractors and contractors' representatives. I then furnished him a card that contained a section of the Fifth Amendment.

Q. Do you have that card with you?

A. Yes, sir. (Produces)

Q. All right. You may proceed.

A. I furnished him the card and asked him, after he read it, if he understood the contents written on the card and he said that he did.

Q. What were those contents?

A. As to the self-incriminating—

The Court: The card speaks for itself.

Mr. Richter: All right. We will mark it for identification as Government's Exhibit 36.

Thereupon said card was marked for identification as Plaintiff's Exhibit No. 36.

Mr. Richter: We offer in evidence Government's Exhibit No. 36.

The Court: There appears to be some memorandum in ink of some kind on there.

Mr. Richter: We will ask the witness about that, your Honor.

Q. Will you look at that card and state what the written memorandum on there means, if anything?

A. It is "received July 1951," initialed by myself. That is to indicate the date that I received this card from my office, when I was sworn in in my position, and I underlined the markings here on the card where it says, "Nor shall be compelled in any criminal case to be a witness against himself."

The Court: You underlined those words before?

The Witness: Yes, sir, I did. I underlined those at the time I got the card, just shortly after I got the card.

The Court: Was that underlining there when you showed the card to Mr. Hollifield?

The Witness: Yes, it was.

The Court: That is all.

Mr. Richter: Is it admitted, if the Court please?

The Court: Yes, it may be admitted.

Mr. Kelley: No objection.

Thereupon said card was admitted into evidence and marked as Plaintiff's Exhibit No. 36.

Q. Mr. Noble, will you read the contents of that card to the jury, please?

A. (Reads) "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use, without just compensation."

Q. Now, what was that quote from? Is there a heading up there?

A. This is the Fifth Amendment.

Q. To what?

A. To the Constitution of the United States.

Q. Now, is there something on the reverse side there?

A. Yes. The information contained on the reverse side of this card is the 24th Article of War, which is read to or furnished to military personnel when they are under investigation.

Q. That has nothing to do with the immediate situation then?

A. No, sir.

Mr. Kelley: I object to that, whether it has or not, that is a conclusion of the witness, whether it has anything to do with the immediate situation.

The Court: Was that on there when you showed it to Mr. Hollifield?

The Witness: It was on the other side of the card.

The Court: It was on the card when you showed it to Mr. Hollifield?

The Witness: Yes, sir. It was on the other side of the card. Yes, your Honor.

The Court: The other side depends on which side you are looking at.

The Witness: That is right.

The Court: So, read what is on that so-called other side.

The Witness: (Reads) "Article of War No. 24. Compulsory Self-Incrimination Prohibited. No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposi-

tion to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue or when such answer might tend to degrade him.

"The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from an accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."

Q. Now, Mr. Noble, was there any other preliminary discussion with Mr. Hollifield on that occasion?

A. Yes. After he had stated that he understood the contents of the card, he was told that he didn't need to answer any questions which would tend to incriminate him or that he was entitled to a lawyer and if he wanted to get an attorney the interview would be suspended until such time as he could obtain one and should an attorney be obtained he would be welcome to sit in on the interview and he was told at the time that any statement that he may make, may be used in evidence against him.

Q. Now, what, if anything, did he say?

A. Well, he said at the time, he says, "I have nothing to hide, so just go ahead with the interview."

Q. All right. Now will you proceed then to relate the substance of the conversation which you had with him on that occasion?

A. Well, I began questioning him about these allegations as to gratuities and moneys from various contractors

or contractors' representatives and specifically I questioned him as to acceptance of money from William J. Opper, a surplus property dealer in Chicago. I told him I had heard he had been getting a commission on every pair of goggles that Opper was selling to these contractors, due to the fact that he had been instrumental in having these goggles approved.

Mr. Kelley: Excuse me, Mr. Witness. Your Honor, would you admonish the jury?

The Court: I was waiting to the point where Mr. Opper was going to enter. I intended to do that.

Q. You may proceed.

A. Then Mr. Hollifield told me that he had met Opper about nine months—about a year previous to that time, which would have been—

The Court: Stop right there. Now, Members of the Jury, I want to instruct you at this time, I can't make my instructions too forceful. It is very important that you keep in mind what I am about to tell you. Perhaps it is rather difficult to be able to do so, but it is one of the duties that you will have to perform to the very best of your ability. In any statement that Mr. Hollifield, the defendant Hollifield may have made to this witness or any other witness, if we reach that stage wherein he mentions Mr. Opper, defendant Opper, you must not, in the absence of Mr. Opper, that is, this office where Mr. Opper was not present,—And he wasn't present, was he?

The Witness: No, sir.

The Court: When Mr. Hollifield, defendant Hollifield makes any statement by way of admission or confession, or whatever you please to call it, as to himself Hollifield, you may consider all of that testimony along with all the other testimony in the case in arriving at your ultimate conclusion and verdict, but you must not consider as evi-

dence in this case as against the defendant Opper anything that may have been said by the defendant Hollifield in Mr. Opper's absence. This testimony is the statement by way of admission or confession, whatever you please to call it of Mr. Hollifield and it applies to Mr. Hollifield alone and exclusively, to nobody else.

So, if in the course of this testimony, the name of Mr. Opper, defendant Opper is mentioned, you may not consider that and must not consider that as any testimony whatsoever as against the defendant Opper. You may consider it for whatever you think it may be worth as to its weight and so forth as against the defendant Hollifield.

Nobody has the right to confess, if you call it a confession, for somebody else. It is all right to talk about themselves, but they cannot make some admission about somebody else who isn't present, at any event, and Mr. Opper was not present on this occasion.

Now, please remember that. It is very important in this case. That principle must not be lost sight of and I instruct you now and I will instruct you later on, if we reach that stage in the trial, but right now I tell you in advance so there cannot be any question, what the Court is trying to impress upon you as forcibly as I can, because that is the law, and the defendant Opper is entitled to the benefit of that law, it is a shield thrown around him in this case, that he is entitled to and it must not be taken away from him. Anything that the witness testifies to that Mr. Hollifield said about himself you may consider along with the other testimony in the case and give it such weight as you deem it properly deserves.

Now, with that understanding, you may proceed.

Mr. Richter: Miss Fischer, will you read the last few sentences of the witness' testimony, so he can pick up his train of thought?

(Thereupon the last answer on the top of p. 90 was read by the reporter.)

Mr. Richter: Now you may proceed.

A. (Continued) That would have been the latter part of September 1950 and then he stated that during November 1950 Mr. Opper came in to Hollifield's office at the Aero Med. Laboratory and told him that if he, Hollifield, could have the goggles, some ski goggles approved so they could be used as a component in the survival kits that he would give him $1750. Hollifield stated that he agreed to the arrangement and pursuant to the arrangement he did submit Opper's goggles to the laboratory and had them approved, and that sometime on or about the middle of April, I think it was, 1951, he received a thousand-dollar payment from Mr. Opper in payment on the $1750. Then he stated that sometime in July, or about, I think three months prior to that, that he had received an additional $200.

Q. What year was that?

A. That was 1951.

Q. 1951?

A. That's right. He received an additional $200 from Mr. Opper but that he had not received the additional $550 that was promised.

Q. Anything else that you can recall?

A. When Mr. Hollifield gave this information, I decided to terminate the interview and reduce the subject to a written statement and I asked him if he would be willing to have the matter reduced to a written statement and he said yes, that he would be willing to. I asked him if he would sign the statement and he said yes.

Q. What was done then?

A. Then I called in a stenographer and began dictating the statement, with the help of Mr. Hollifield. We both dictated the contents of the statement and after the statement had been dictated and typed, it was submitted to Mr. Hollifield, who read it over and made corrections before he signed it and then he signed it.

Q. How were those corrections made?

A. Those were made by ink and they were made in Mr. Hollifield's own handwriting.

Q. Will you state whether or not Mr. Hollifield signed the typewritten statement?

A. Yes, sir, he did.

Mr. Richter: Mark this for identification Government's Exhibit 37.

Thereupon a statement made by defendant Hollifield was marked for identification as Plaintiff's Exhibit No. 37.

Q. I will hand you Government's Exhibit 37 and ask you—

The Court: For identification.

Mr. Richter: Oh, yes.

The Court: Better show it to counsel.

Mr. Richter: Oh, yes. All right.

Mr. Kelley: May we approach the bench?

The Court: Now, Members of the Jury, counsel would like to have an opportunity to examine this document, which I think they should have, of course, and it is suggested, perhaps, I would adjourn until quarter past 2 and give them a chance to not only go over the document but give them a little opportunity to get their lunch too. So now, I will recess the further hearing of this cause until 2:15 this afternoon. During this interval you will bear in mind my usual admonition and return here, if you please, at quarter past two this afternoon.

Adjourn court until 2:15.

Thereupon the further proceedings in this trial of this cause were adjourned until 2:15 o'clock of the afternoon of the same day.

Afternoon Session.

Tuesday, May 20, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

MR. MONCURE NOBLE resumed the witness stand and testified further on **direct examination** as follows:

By Mr. Richter:

Q. Mr. Noble, I will hand you Government's Exhibit No. 37 and ask you if you can identify the handwriting that appears thereon, in every place in which it does appear?

A. Yes, sir. This is the signature of Mr. Hollifield, myself and John Collins.

Q. Those are the signatures?

A. Those are the signatures and the writing in the body of the contract—I mean in the statement, is that of Mr. Hollifield.

Q. The handwriting of Mr. Hollifield?

A. That's right.

Q. Was that signature of Mr. Hollifield and the other handwriting of his put on there in your presence?

A. Yes, sir.

Mr. Richter: If the Court please, at this time, we offer in evidence the statement, Government's Exhibit 37, to the extent that it has not been deleted or covered over.

The Court: I think if any part of it is going to be deleted, perhaps, it should just be marked for identification and so much of it, of that statement as the government wishes to offer in evidence may be read to the jury, as a part of the record in this case. I don't think if you are going to delete a part of it that the instrument should go in as an exhibit.

Mr. Richter: All right. We will proceed according to that arrangement, if your Honor please.

The Court: Counsel may read—either counsel may read it or the witness may read it, so much of that statement which has been signed by Mr. Hollifield, as I understand, according to the witness' testimony,—so much of that as the government wishes to offer into evidence, as a part of the statement, I understand, the government feels is not pertinent or relevant in this case and they have deleted it. That is all right, if you wish to do that. I am not going to tell the government what they should put in evidence or what they should leave out, but I think there is some question about the deletion. The government should put into evidence only so much of that exhibit as the government wishes to offer, but the instrument should stay here marked for identification so that counsel for defendants may have the right to cross-examine from it, if they wish to do it.

Mr. Richter: That is our purpose, if the Court please.

The Court: Very well.

Q. Mr. Noble, will you read—

Mr. Svoboda: If your Honor please, I would like to object to submission of this in evidence on the same grounds that were stated in the memorandum that was submitted to the Court—this oral statement from the confession as submitted on the same grounds that were submitted in our memorandum.

The Court: I understand that.

Q. Mr. Noble, will you read from this confession of Robert George Hollifield, Sr., the parts thereof which have not been obliterated?

The Court: I think we better get that straight. There has been no part of that obliterated.

Mr. Richter: Well, the part which the government desires to offer in evidence.

The Court: There has been a blank page put over part of it. If the government doesn't care to offer that, they

don't have to offer it. You read from that document so much as the government offers in evidence.

Mr. Svoboda: I would like to object to the word "Confession".

The Court: Read from the document marked Government's Exhibit 37 for identification, whatever it may be, just read from that. That is what we are—the best way to refer to it here is by exhibit number, I think, Exhibit No. 37 for identification.

A. (Reads) "I, Robert George Hollifield, Sr., residing at 2053 Arlene Avenue, Dayton, Ohio, prior to making the statement contained in the following paragraphs, have had explained to me my rights under the Fifth Amendment to the Constitution of the United States by Special Agents Moncure Noble and Laurence Collins, who have identified themselves to me as Agents of the Office of Special Investigations, U. S. Air Force. I understand that I do not have to make any statement, that any statement I do make may be used against me in a court of law, and that I have the right to have an attorney. With such an understanding, I voluntarily and of my own free will, make the following statement:

"I am presently employed as Chief, Land Survival Unit, Medical Specialty Branch, Aero Medical Laboratory, Wright Air Development Center, Wright-Patterson Air Force Base, Dayton, Ohio. In my present position I supervise other engineers in the unit and assist the project engineers in their work. I am authorized to make decisions and directing policy of my unit. I am also authorized to prepare kit specifications and approve deviations thereof.

"I have been asked whether or not I am acquainted with a William J. Opper, Chicago, Illinois. I wish to state that I have known Mr. Opper for about a year. Mr. Opper is a dealer in surplus property, particularly ski goggles of the type used in Air Force survival kits. Approximately nine months ago Mr. Opper called at my office in the Aero Med-

ical Laboratory and offered to pay me the sum of $1750 provided I would submit his surplus goggles to the Vision Unit, Physiology Branch, Aero Medical Laboratory and arrange to have them approved and accepted by the Air Force as an acceptable component of survival kits. I agreed to do this and in accordance with this agreement samples of these goggles were submitted to the above branch and after testing said goggles I arranged to have it determined that while these goggles did not meet the original specifications they would generally serve the purpose and could be used in the kits under procurement at the time. Approximately five months ago I received a payment of $1000 cash from Mr. Opper, pursuant to our agreement, and about the middle of July 1951 I received an additional payment of $200 cash from Mr. Opper. I haven't received any additional payments from Opper since that date. During my last contact with Opper, which was approximately 15 July 1951 at the time I received the above $200 payment Opper advised me that I was to receive approximately $1750. However, as stated above, I have not received the additional $550. I would like to make this point clear. I would have submitted goggles presented by any contractor for analysis, regardless of whether or not any consideration had been promised me, particularly when it required a deviation from the original specifications. I would like to further state that the goggles submitted by Opper, while not in accordance with the original specifications, did meet the requirements or purposes for which they were intended. Furthermore, I would like to state that in my mind, in the above transaction, that I did not in any manner make an effort to accept inferior equipment which the Government was procuring.

"I would like to state that the above should not be construed to mean that any allowance of deviations was only to obtain gratuities, money or gifts, but in the performance of any duties or reasonable requests, and I would have acted upon as such for any contractor or prospective contractor.

"I have read this statement consisting of three pages and it has been read to me. I have initialed all preceding pages and corrections."

It is signed "Robert George Hollifield, Sr." And it was sworn to and subscribed before me the 26th day of September, 1951, and signed by myself; witnessed by Laurence Collins.

Mr. Richter: If the Court please, I think the witness read "performance of any duties" when he should have read "performance of my duties" during the course of the reading.

The Court: Point it out.

Q. Where is this "performance of my duties"?
A. "Performance of any duties".

Mr. Richter: "Any duties" is correct

Mr. Kelley: If the Court please, having read it once, I believe the witness should read the entire sentence in its correct form.

Mr. Richter: He has indicated the form in which he read it was the correct form. I thought it should be "my duties" and it should be "any duties".

Mr. Kelley: Your Honor, this morning to the fullest extent did admonish the jury concerning the fact that any statement of Hollifield may be considered only against him and not against Opper. Out of an abundance of precaution, may I request that the Court instruct the jury further that that holds true not only as to oral statements but as to written statemens of this kind as well?

The Court: Yes, it does, Members of the Jury, whether oral statement or written statement. Mr. Hollifield, defendant Hollifield, can make the statements or confessions—They don't particularly like that word. I don't like it myself. I don't know how else to express it, hardly. He can only make those as against himself. He can't make

a confession as to somebody else, no more than somebody else can confess my sins, or your sins, or anybody else's. We have to confess our own when the time comes. So that is the way it is here. I tried to impress on you and do again, this testimony is directed against the defendant Hollifield only and must be considered by you as against Mr. Hollifield, defendant Hollifield only whether it be by way of oral conversation or whether it be in writing.

Mr. Richter: You may have the witness.

Cross-Examination, by Mr. Kelley.

Q. How long, Mr. Noble, have you been Special Agent in the O. S. I.?

A. Since the 2nd of July 1951.

Q. And at the time that you had this conversation with Mr. Hollifield you had then been Special Agent how long?

A. From July until the 26th of September.

Q. What had been your occupation prior to becoming Special Agent?

A. I was special agent with the U. S. Department of Agriculture and War Assets Administration.

Q. How long had you held that position?

A. Since May 7, 1941.

Q. What was your occupation before that?

A. Before that I worked as a salesman, appliance salesman in a department store.

Q. Are you an attorney-at-law?

A. I am a graduate of law. I am not an attorney. I never took the Bar.

Q. Have you ever been admitted to practice in any state at all?

A. No, sir. I never took the Bar.

Q. What time of day did Mr. Hollifield arrive at your office?

A. 9:30 in the A. M., in the morning.

Q. How long was he kept there?

A. Well, I was through with him about 4 o'clock in the afternoon.

Q. You say you were through with him about 4. My question was not about when you were through with him. Do you remember my question?

A. How long I kept him.

Q. How long was he kept there in your office, was my question.

A. Well, I turned him over to the F. B. I. at 4 o'clock and I don't know how long they kept him there, because I left about 5.

Q. You turned him over to the F. B. I.?

A. Yes, sir, I did.

Q. You mean you passed down the custody of him to the F. B. I.?

A. No. I mean upon receiving of the statement indicating a violation of the Federal Statute, the F. B. I. was notified and they sent out agents and Mr. Hollifield was introduced to the agents of the F. B. I., Mr. Pardo and Mr. Landis.

Q. At or about the time that you had him sign that statement did you or did you not tell him that when he signed it he could go home?

A. No, I didn't tell him that.

Q. Who was your assistant or associate?

A. Mr. Collins.

Q. Do you know whether he made that statement to him or not?

A. No, because I talked to Mr. Hollifield last.

Q. Let's see. You say you had him in your custody from 9:30 in the morning until when?

A. About 4 in the afternoon.

Q. Did he go to the toilet room during that time?

A. Several times.

Q. Did anyone go with him into the toilet room?

A. Yes. I went with him once.

Q. Why?

A. Well, I wanted to go, so I went.

Q. Did you consider him under arrest?

A. No, sir. I haven't the power of arrest.

Q. Why did you follow him in the toilet room?

A. As I told him, because I wanted to go also.

Q. Only for that reason?

A. Yes, that is all.

Q. Was that true on more than one occasion that you had the joint desire?

A. I only went with him once. I don't know whether he went more than that or not. I don't think he did.

Q. Do you know how long the F. B. I. detained him there after you turned him over to the F. B. I.?

A. No, sir.

Q. Did you take him out to a meal?

A. We did. At 12:10 we had a box lunch brought down from the cafeteria and we ate in the interviewing room, in the interrogation room.

Q. You think it was 12:10?

A. That is right.

Q. Did you keep a log?

A. Yes.

Q. Where is your log?

A. In my pocket.

Q. Would you produce it?

A. (Witness produces log.)

Q. Your hands are shaking, sir. Are you nervous?

A. Yes, I am a little nervous.

Q. Was Mr. Hollifield nervous during the hours you interrogated him?

A. I imagine he was. He didn't say.

Q. Did you make any promises to Mr. Hollifield?

A. No.

Q. Of any kind?

A. None whatsoever.

Q. Did you threaten him?

A. No, sir.

Q. You are not supposed to do that, are you?

A. No, sir. You will find the three first pages of those are the notes I made in preparation of the interview.

Mr. Kelley: May these be marked for identification, please, Defendant's Exhibit E?

Thereupon said log was marked for identification as Defendant's Exhibit No. E.

Q. Is that known as a detainer log?

A. No. That is the notes I made on the interview.

Q. Didn't I ask you a moment ago if you kept a log or not, and didn't you say yes?

A. I kept a record.

Q. Do you recall my using the word "log"? Don't you?

A. I don't recall that. We don't keep a log. I keep my notes.

Q. So your testimony is, you don't know what I mean by a detainer log?

A. No. If you said that, I didn't understand it that way.

Q. You didn't understand me to use the word "log"?

A. I understand the meaning of the word "log" but I don't remember your saying that.

Q. You don't remember my saying "Did you keep a log?"

The Court: May I see that, please? I will give it a name.

Mr. Kelley: I should like to test this witness' recollection.

The Court: "Agent's Notes" I will put on my docket. Just something to identify it, Gentlemen, that is all I asked for.

Mr. Kelley: The purpose of my examination is also general. I wish to know the—to test the agent's recollection, his accuracy on the stand.

The Court: Certainly.

Q. I asked you sometime ago whether you observed that Mr. Hollifield was nervous during any part of this many hours' interrogation. Did you observe anything indicating he was?

A. No, I didn't.

Q. Did you notice whether he was perspiring at all?

A. No, no I didn't. We had a fan in the room.

Q. You handed him a card that you identified this morning and asked him to read it?

A. Yes, sir.

Q. In addition to that you orally advised him of his Constitutional rights; is that correct?

A. I orally advised him of his rights, certain rights, yes, sir.

Q. Was that also done by Mr. Collins?

A. No. I did that, but Mr. Collins was present.

Q. Now, as to your question of how long he had known Mr. Opper, how did he respond to that?

A. Yes, sir. He stated that he had known Mr. Opper since, I believe it was September 1950.

Q. You didn't testify to that before on your direct examination, did you?

A. Yes, sir.

Mr. Richter: Object.

Q. In so many years?

Mr. Richter: The witness did testify that.

Mr. Kelley: No, he didn't.

Mr. Richter: Refer to the record.

Q. Didn't you in your direct examination say, in response to that question by you he said about a year?

A. That was on the—We asked him the question. He said in about September 1950. But when we were dictating the statement, Mr. Hollifield wanted that changed to "about a year".

Q. I am asking now, don't you recall testifying this morning that he said about a year, which would be about September?

A. I think I said it was about September 1950.

Q. How long have you known Mr. Aug?

A. Who?

Q. Mr. Aug. About how long have you known him?

A. I met him about last week.

Q. About last week?

A. I met him last week.

Q. Is it your testimony that Mr. Hollifield said that he had known this man since September, or was it a presumption?

A. That is what he said. He said he had known him from about September 1950.

Q. Are you using the word—I can't hear you.

A. He said he knew him since about September 1950.

Q. He didn't use the expression "about a year ago" then?

A. Later on in the statement he did, but at the time I questioned him he said "about September 1950".

Q. Did you ask Mr. Hollifield about other transactions other than Mr. Opper?

A. Yes, I did.

Q. Did you at the time you turned him over to the F. B. I. agents show him this statement you identified?

A. I furnished them a copy of it.

Q. At that time?

A. Yes, sir.

Q. I am referring to that portion of the statement which you read which recites, "I would like to make this point clear. I would have submitted goggles presented by any contractor for analysis, regardless of whether or not any consideration had been promised me, particularly when it required a deviation from the original specifications. I would like to further state that the goggles submitted by Opper, while not in accordance with the original specifications, did meet the requirements or purposes for which they were intended. Furthermore, I would like to state that in my mind, in the above transaction, that I did not in any manner make an effort to accept inferior equipment which the Government was procuring. I would like to state that the above should not be construed to mean that any allowance of deviations was only to obtain gratuities, money or gifts, but in the performance of any duties or reasonable requests, and I would have acted upon as such for any contractor or prospective contractor." Was that statement made to you in the presence of Mr. Collins?

A. This particular part of the statement was dictated by Mr. Hollifield himself in the presence of Mr. Collins.

Q. And yourself?

A. Yes, sir.

Mr. Kelley: Your Honor, I don't like to waste time but may I be given a few moments to examine into this document?

(Confers with co-counsel.)

Q. Do I understand, Mr. Noble, having reference to Defendants' Exhibit E for identification that you either prepared these notes in anticipation of this interview with Mr. Hollifield or during the course of that interview? Is that right?

A. I prepared those notes during the course of the interview.

Q. All of them?

A. Yes, sir, all of them.

Q. What date did you hold that interview?

A. 26th of September.

Q. What date appears on here, on the first page?

A. I am informed here—

Q. Answer my question.

A. 25th of September.

Q. All right.

A. Those are the notes I prepared to interview him by.

Q. Don't you recall just two minutes ago my asking you as to the notes here, were they not prepared by you in anticipation of this interview *or* during the interview?

A. This was. The first three pages there was prepared on the 25th. I was anticipating the interview and I prepared notes covering the allegations. That I did so when I talked to him I would have in mind what I wanted to talk with him about.

Q. It was for the purpose of conducting this interrogation of Mr. Hollifield?

A. That is right, those first three pages.

Q. They all appear in your handwriting?

A. Yes, sir.

Q. One more question. You recall a few moments ago, Mr. Noble, that I read certain passages from this document, Plaintiff's Exhibit 37. I think you said those passages were dictated by Mr. Hollifield.

A. That's right.

Q. Did he dictate the balance of it?

A. He helped dictate the balance of it.

Q. What do you mean by "helped dictate the balance of it"?

A. I went over n.y. notes with him. In dictating the statement, I would dictate a line to the girl, to the stenographer and if it didn't exactly suit him, or anything wasn't exactly right, he would change it the way he wanted it.

Q. You undertook to dictate from your notes to the stenographer; is that right?

A. Well, yes. The two of us we went over the notes together. We went down to the office and dictated the statement and in dictating the statement if I stated something that Mr. Hollifield felt he didn't want in the statement, then he corrected it and dictated it the way he wanted it.

Q. Do you know where Mr. Collins is now?

A. He is somewhere in Cincinnati. His home address I don't know.

Mr. Kelley: That is all.

The Court: Did you Gentlemen wish to ask any questions on behalf of Mr. Hollifield? I mean by "you Gentlemen" Mr. Svoboda and Mr. Meyring.

Mr. Svoboda: No, sir.

Mr. Meyring: No, sir.

Redirect Examination, by Mr. Richter.

Q. Would you make the sequence of events a little clearer as to what occurred after you started the interview? How long was it after you started the interview that the statement was dictated?

A. I started the interview at 9 and it was terminated at about 11 and we started dictating the statement at about 11 until, I think it was about a little bit after 12.

Q. And what did the defendant Hollifield do while the statement was being dictated or typed?

A. We had lunch and he sat in the office there and we talked.

Q. Did you question him about anything during that interval?

A. The only thing I was just—I just asked him whatever made him do it. He said: Well, he didn't know. He guessed he didn't have any scruples.

Q. Then you had lunch after that; is that right?

A. Yes, sir, that's right.

Q. What happened after lunch?

A. After lunch we waited for the statement to be typed up and when the statement was typed up it was presented to Mr. Hollifield and it was read to him. Then it was presented to him for him to read it and to make any corrections he wanted on it and there was six copies of these statements and it took quite a long time to read each and every one and make identical corrections on each one. I might say shortly after the termination of the interview at 11 o'clock, I think it was, I told my supervisor Mr. Braun—

Mr. Kelley: Don't tell us what you told your supervisor.

The Court: Don't tell what you told your supervisor. What did you do?

A. (Continued) I informed him of the—

The Court: No.

Mr. Richter: Just state what you did.

The Court: You told something to Mr. Braun; is that right?

The Witness: That's right.

Q. Then what?
A. He called the F. B. I. and—

Mr. Kelley: Just a moment. I don't know who he is talking about, he.

The Witness: Mr. Braun called the F. B. I.

Mr. Kelley: I object to what Mr. Braun did.

The Court: Were you present when he did that?

The Witness: Yes, sir, I was present.

The Court: Go ahead.

A. (Continued) And he called the Cincinnati office of the F. B. I. and asked them to send out some agents, which they did, and upon the completion of the corrections and the signing of the statement, which was about 4 o'clock in the afternoon, Mr. Hollifield was introduced to Mr. Pardo and Mr. Landis of the F. B. I.

Q. Will you read to the jury the handwriting appearing on the first page of Government's Exhibit 37?

Mr. Kelley: If the Court please, this has already been read to the jury by this witness on direct examination.

The Court: Go ahead. Overrule the objection. He may read what is in the handwriting.

A. "I am also authorized to prepare kit specifications and approve deviations thereof."

Q. Who wrote that?
A. Mr. Hollifield.
Q. Was it his language, his composition?
A. That's right; that is his language.

Mr. Richter: We are through with the witness, if your Honor please.

The Court: Will the witness Collins be called?

Mr. Richter: We don't intend to call Mr. Collins. It would be merely cumulative.

The Court: All right. I don't care. I want to ask a question, but I don't want to do it until I find out about it. Now, before we adjourned this noon, counsel for defendants and for the government approached the Bench here. I don't know whether this appears exactly, or what was stated at that time, but this is what took place I am very sure counsel will say: Counsel for the government had this document now marked Government's Exhibit No. 37 for identification. Mr. Kelley asked we adjourn. It was almost adjournment time. We adjourned at that point until quarter past 2 to give counsel an opportunity to examine what is Exhibit 37 for identification. The Court said that was quite proper. Counsel for the government then said that these parts that are deleted are not permanently deleted, but just by the putting on of white paper with brads across certain portions of Exhibit 37 for identification, and that it was agreeable for counsel for defendants to read all of Exhibit 37, including those portions that were deleted.

Now, is there any exception to what I have said, or any modification or difference of opinion, as to what was said at that time? If so, I would like to have it pointed out.

Mr. Kelley: I think there was perhaps more said, but I agree with your Honor with so much of what your Honor has said.

The Court: What I have stated is correct?

Mr. Kelley: Yes, so far as it goes.

The Court: I don't know whether counsel for defendants had an opportunity to look at so much of these statements as have been temporarily deleted, and if they did not have that opportunity, I am going to take a recess now to give you the opportunity to do that.

Mr. Kelley: May it please the Court, we haven't reached the stage where the defense is putting in any case, of course, and I think that your Honor also stated from the Bench this morning, in a Bench conference, in addition to

what you have said that the defense at any time would have the opportunity, if it so desired, to call the Court's attention to any other portion in here which it felt was relevant or worthy of the Court's attention, and, of course, we still possess that right. Of course, we aren't putting any case in and at the proper time we will want to call the Court's attention to some other parts in there.

The Court: Before the witness Noble is excused I want to give the defendants an opportunity, if you care to take it, to cross-examine him about anything that appears in Exhibit 37 for identification that has been deleted.

Mr. Kelley: Of course, whatever has been deleted hasn't been offered. There has been no offer of that part, your Honor.

The Court: I know, but if you want to cross-examine him about it, you may do so now, any of you Gentlemen.

Mr. Kelley: Your Honor, I do not conceive either the desire or propriety of my cross-examining this witness on something not in evidence and not before this Court. However, I should not want to foreclose the right, if the ends of justice indicate it proper, that he might not be called at another time as a witness for the defense, to go into these other portions. We desire, at the proper time, also to view these other portions of this document.

The Court: All right.

Mr. Richter: The only thing, that is not pertinent to your question. Did the defense have an opportunity to investigate the instrument? I believe the answer to that question is, they did.

Mr. Kelley: We did.

The Court: All right. You may be excused.

Mr. Svoboda: May we have a recess?

The Court: We don't want to take so much time for recess. We did not start until almost half past two. I have

no objection, but we take so much time when we recess. I don't think we make much progress. We will take a little recess for five minutes. Counsel wait a minute.

Thereupon the jury retired from the court room and the following proceedings were had in the absence of the jury:

(Counsel confer with the Court at the Bench, off the record.)

The Court: I want to talk to Mr. Richter and Aug about a matter that has nothing to do with this case. However, I will be very glad and much prefer if one of you Gentlemen representing each one of the defendants would come into my chambers. I will take advantage of this recess now to talk to them about another case.

Mr. Canny: Well, Judge, I think that in our experience with you, what you just said is enough for me.

The Court: We have a case set for tomorrow and all the jurors are ordered in and there was a question of whether the case was going to be tried or not. I just learned this afternoon it will have to be tried and I want to talk to these Gentlemen about what date we could set succeeding this case as to go forward.

Mr. Canny: Perfectly all right.

The Court: I didn't want to have them come in to talk about it and have counsel think that I was talking to one side in the absence of the other. So, if you will come in, or just come here, Mr. Richter and Mr. Aug, I will talk to you right here.

Thereupon a five-minute recess was had. And thereupon the jury returned into the court room and the following proceedings were had in the presence of the jury:

Testimony of Clay W. Pardo

MR. CLAY W. PARDO, being duly sworn, testified as follows:

Direct Examination, by Mr. Richter.

Q. Will you state your full name, please?

A. Clay W. Pardo.

Q. Where do you live, Mr. Pardo?

A. I live in Cincinnati, Ohio, at 1332 Lamar Drive.

Q. What is your occupation?

A. I am a special agent of the Federal Bureau of Investigation.

Q. How long have you been engaged in that occupation?

A. It is a little longer than ten and a half years.

Q. Have you ever met the defendant Robert George Hollifield in this case?

A. I have.

Q. Can you identify him in this court room, by stepping down and placing your hand on his shoulder?

A. Yes, I can.

Q. Will you do that, please?

A. (The witness does as requested by counsel.)

Q. All right. Have you ever had any conversations with Mr. Hollifield?

A. Yes, I have.

Q. When?

A. September 26, 1951.

Q. And where was that?

A. That was at Wright-Patterson Air Force Base, in the office of the Office of Special Investigation, Fifth District.

Q. Who was present at the time, besides yourself and Mr. Hollifield?

A. Another agent of the Federal Bureau of Investigation, Jack Landis.

Q. And what time of the day was it?

A. This was in the afternoon. We started talking to him, it was approximately 4 o'clock or about five minutes after four when we actually started.

Q. How did you happen to come to Dayton for that purpose?

A. I was already in Dayton and I got a call from my superior in Cincinnati to go out there to the Office of Special Investigations.

Q. When you did start to talk to Mr. Hollifield will you tell the Court and Jury what preliminary statements or conversations took place?

A. When I first met Mr. Hollifield in the Office there, I told him who I was and that I was connected with the F. B. I. I also told him that he didn't have to make any statements to me; he had the right to have an attorney if he so desired and I told him that I wanted him to understand that anything he said might be used against him.

Q. What did he say in response to that, if anything?

A. Well, he told me that he didn't have any objections to talking to me; that he already had made admissions to the O. S. I.

Q. Will you relate to the Court and Jury the substance of your conversation with Mr. Hollifield on that occasion?

A. Well, I first asked him some questions as to his position at Wright-Patterson Air Force Base and he told me that he was a designer in the land survival unit, which was a part of the Aero Medical Laboratory. He told me that he was a project engineer on a survival kit known as the E-1 kit and he told me he had assisted in developing other kits.

Q. Anything else?

A. Yes. Then I asked him about whether or not he knew a person by the name of William Opper and he told me he did. I asked him when he had met Mr. Opper and he told me he couldn't remember the exact date or the place, but it was about a year prior to our conversation on September 26, 1951. So, I asked him other questions concerning his relationship with Mr. Opper, how long he had known him, and he still couldn't remember the exact time he first met him, and he told me that sometime after

he first met him that Mr. Opper came to his office in the Aero Medical Laboratory, at Wright-Patterson Air Force Base.

Q. Pardon me, Mr. Pardo. About when was that? Did he indicate about when it was?

A. Well, he said he couldn't recall the exact date, but it was after he first met him and he told me that the best he could recall, it would be sometime around the first part of the year 1951.

Q. Then what was said?

A. Then he said at this time William Opper told him that he had some goggles that he would like to sell to the government and that he knew that some of these goggles would meet the government specifications and he knew that others would not meet the specifications, and also that by just looking at the goggles you couldn't tell one from the other, from visual inspection. Mr. Hollifield continued that he and Mr. Opper went into a supply room, which was near Hollifield's office, and in this supply room Opper told him that if he would accept these goggles he, Opper, would make it interesting to him, and the conversation continued. Hollifield said that there was some mention as to how much Opper would pay him for each goggle, but Hollifield said he couldn't remember what the price was, or how much Opper was to give him for each goggle, but he did remember that the total amount he was to get was $1750. Then he said that no money transpired at that time—no money passed hands at that time, and it was some time later, approximately, in April 1951 he called Opper from Dayton to—Opper was in Chicago at the time and then on a Saturday he flew or went by airplane to Chicago and there he went to Opper's office. He said when he got to Opper's office it was closed and he went down on the street near the entrance to the building and waited a few minutes and Mr. Opper came by and the two of them then went back up into Mr. Opper's office and there Mr. Opper gave him $1900 in U. S. currency. Hollifield continued by

saying that he then came back to Dayton from Chicago on this same Saturday, which he thought was in the month of April 1951, and around July 1951 Mr. Opper came to Dayton and while in Dayton Opper gave him $200. Now, Mr. Hollifield said that he couldn't recall where in Dayton that Mr. Opper gave him the money, but he knew that it happened either in Dayton or the vicinity of Dayton.

Now, at that time I questioned Mr. Hollifield as to whether or not Mr. Opper had given him any other money and he told me he had not and I also questioned him as to whether or not this $1200 that he had received was a part of the agreement or a part of the amount of $1750 that he was to get and he told me, yes, that that was a part payment of the $1750. I mentioned to him that, well, the difference then was approximately $550 that, according to his statement, he had not received, and he said that was right, but he had intended on getting this additional $550.

Q. Anything else?

A. Well, that is generally the—or at least briefly what he told me.

Q. Substance of it?

A. That is the substance of it, yes.

Q. Were these statements of Mr. Hollifield reduced to writing at that time?

A. Yes, they were.

Q. Who was present when they were reduced to writing?

A. Well, Mr. Hollifield was present and Mr. Landis from our office was present and I was present.

Q. Who reduced the statements to writing?

A. I did.

Q. Mr. Hollifield was present?

A. Yes, he was.

Mr. Richter: Mark this for identification as Government's Exhibit 38.

Thereupon a statement was marked for identification as Plaintiff's Exhibit No. 38.

Mr. Kelley: If the Court please, may I approach the Bench?

Thereupon the following proceedings were had at the Bench, out of the hearing of the jury:

The Court: Counsel for defendant have been handed a document marked Government's Exhibit 38 for identification, which purports to be a statement by the defendant Hollifield, written, as I understand, according to the witness on the stand, by the witness in Mr. Hollifield's presence. This document was signed by the defendant Robert George Hollifield, Sr., and sworn to as appears upon the document. Portions of this document have been temporarily deleted. By "temporarily" I mean that a white page has been placed over a portion of it with brads or staples,—office brads. However, everything that was there is still there and all that is necessary is to remove the brads and anyone reading it then can read the whole statement. Now, I understand that counsel for defendants would like for the court to recess now to give them an opportunity to examine this carefully before tomorrow morning. Is that right?

Mr. Kelley: Yes, your Honor.

Mr. Svoboda: That is correct, your Honor.

The Court: That is quite all right. I have no objection to that at all. I want the record to show, however, so far as the Court is concerned, counsel for defendants may read everything that is in this document marked as Plaintiff's Exhibit 38 for identification, everything that is written in there; I mean everything that is temporarily deleted. If the government offers the document in evidence, or wishes to read some of it in the record, of course, they only need to offer so much as the government wishes to offer, but the defendant may have the opportunity, if they wish, then to read any of it or any of the other parts in the record, if they care to. I suggested when

the other witness was here, Mr. Noble, that he be cross-examined about it.

Mr. Kelley: Surely defense can't read into evidence until it comes time to put in his case.

The Court: I thought afterwards counsel was right about that. I hate to have a witness go and then something come up later on. But he can be recalled, if the defendant wishes to recall him and so can this witness, with regard to anything that defendant wishes to offer in evidence, if such there be.

Now, at this time, the document is only marked for identification, you understand, and with that understanding, as far as the Court is concerned,—Has the government any objection to counsel reading all of it?

Mr. Richter: We might feel that we would object to some of it being irrelevant.

The Court: I understand you may raise the question whether or not it is relevant or not, if there is any portion offered in evidence, but do you have any objection to the defendant reading everything that is in there?

Mr. Richter: No, no.

The Court: It would be rather difficult for the defendant to know if there is anything they are going to object to. They are free tonight to read everything, whether deleted or whether it is not and then determine what they wish to do about it.

Mr. Kelley: Of course, it is my understanding that in a criminal case it would be improper for the defendant to offer anything in evidence until the government is rested.

The Court: You are quite right and I think you were right when the witness Noble was here. My only thought was—I was thinking about his going away and maybe you may want to cross-examine him. But I think you are right. After you brought my attention to it, I thought

you were correct. You can't cross-examine about something that is not in evidence, but later on, if you care to offer any of it, you may have the opportunity to do that, of course, that is, such portions as the government does not offer. Then if there is any question comes up about any part of it, I will cross that bridge when we come to it. Very well.

Mr. Svoboda: Thank you.

Thereupon the following proceedings were had in the hearing of the jury:

The Court: Members of the Jury, counsel for defendant wish the opportunity to examine this statement that has been now marked as Government's Exhibit No. 38 for identification and I think they should have that opportunity, of course. I know they should have it. It is almost our adjournment time and in order to give them full opportunity to go over it together, why, I am going now to recess the further hearing of this case until tomorrow morning at 11 o'clock. During this interval you will bear in mind my usual admonition and return here, if you please, at 11 o'clock tomorrow morning.

I may say, so you won't get confused about it, all of our other jurors are coming in tomorrow morning, too. I had them come back tomorrow because we had a case set to start tomorrow. We are always optimists over here. We always think we are going to be ready to go forward at a particular time, but now we will have to go forward with that case when we finish this. We can't try but one at a time. That is what I wanted to ask Mr. Aug about when we adjourned.

So, you may now be excused and return here, if you please, at 11 o'clock tomorrow morning. If you see those other jurors here tomorrow, don't be concerned about it. I will have to excuse them until sometime later. You may now be excused.

Adjourn court until 11 o'clock tomorrow morning.

Thereupon the further proceedings in the trial of this cause were adjourned until tomorrow morning at 11 o'clock.

Morning Session.

Wednesday, May 21, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

MR. CLAY W. PARDO resumed the witness stand and testified further on **direct examination**, as follows:

By Mr. Richter:

Q. Mr. Pardo, I will hand you Government's Exhibit No. 38 and ask you if that instrument was signed by Mr. Hollifield in your presence?

A. Yes.

Q. Will you point to the signature and identify it, please?

A. The signature is on the last page, approximately near the middle of the page.

Q. And what is the writing which appears beneath it?

A. Beneath the signature of Hollifield appears "Subscribed and sworn to before me this 26th day of September 1951" and I signed that "Clay W. Pardo, Special Agent, F. B. I." and it is also witnessed by Jack Warren Landis, who was with me, "Special Agent, F. B. I., September 26, 1951."

Q. Now, Mr. Pardo, will you read to the Court and the Jury the contents of this statement, except such parts as are temporarily marked out? Pardon me just a minute. (After conferring with co-counsel:) Proceed, Mr. Pardo.

If the Court please, we offer in evidence Plaintiff's Exhibit No. 38.

The Court: Yes. Well, at this time, we will leave it marked for identification and the witness may do what

you asked him to do, read now into the record so much of that statement as has not been temporarily deleted.

Mr. Kelley: For the record alone, may it show that the defendant Opper interposes the same objection that was put before the Court and which was argued here on Friday?

The Court: Oh, certainly. Yes, sir, and of course, the jury will understand that this is a statement, claimed at least, testified to be a statement by Mr. Hollifield, the defendant Hollifield. I explained to you yesterday, I repeat so there won't be any question about it, that everything that is stated, now going to be read from this alleged statement by Mr. Hollifield, you may consider in your determination of this case as against Mr. Hollifield, the defendant Holiifield alone. You must not—I can't say that too strongly to you—you must not consider anything that is said in this statement as testimony against the defendant Opper. Mr. Opper wasn't present—or, was Mr. Opper present when this was taken?

The Witness: No, your Honor.

The Court: All right. Then you must not consider anything that was said in the absence of the defendant Opper as testimony against him, but you can consider it and give it such weight as you think it properly deserves as against the defendant Hollifield, who is the defendant that is claimed testified to, at least, made this statement. Now, that has reference to this statement as well as the one I called your attention to yesterday.

Now, you may proceed. Read it loud, if you please.

A. (Reads) "Dayton, Ohio, September 26, 1951. I, Robert George Hollifield, Sr., make the following sworn statement voluntariiy to Jack W. Landis and Clay W. Pardo who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to me. I have been advised of my right to counsel and that what I say may be used against me.

Testimony of Clay W. Pardo

"I am 37 years of age and reside with my wife and two children at 2053 Arlene Avenue, Dayton 6, Ohio.

"I am employed as a designer, Land Survival Unit, Medical Specialty Branch, Aero Medical Laboratory, Wright-Patterson Air Force Base, Dayton, Ohio. My duties as a designer included developing survival kits for the Air Force and I was the project engineer on a kit known as "E-1". I helped to standardize the "E-1" kit. I helped to write the specifications for this kit. I might say here that I made some mistakes in these specifications in that some of the material requirements turned out to be critical and hard to get. Some deviations we made in this regard at the request of contractors.

"Around the early part of 1951, William J. Opper came to my office about some ski goggles he was interested in selling to the government. Opper said some of the goggles he had met the procurement requirements and others did not but he could not tell them apart from visual inspection. In the supply room near my office, Opper said to me something like, 'If you can use them I can make it interesting for you.' He said he would give me so much for each goggle the government purchased but I do not recall this amount. I do recall that the total he agreed to give me was about $1750.

"Opper brought in a sample goggle and wanted to know if it was satisfactory. I had it tested and in my opinion it was satisfactory. I wrote to procurement and told them the sample goggle was acceptable.

"As a result of this agreement with Opper, I have received a total of $1200 from him. I received $1000 in cash around March or April 1951 or about five months ago. I went to Chicago and got this money from Opper in his office. Around July 1951, Opper was in Dayton, Ohio and gave me $200. There is nothing definite about when I was to get the balance of $550 but it had been my intentions to get it."

The following and conclusion of the statement was written by Hollifield himself after he had read the statement:

"I have read this page and four previous pages and to the best of my knowledge the foregoing is true and correct." Signed "Robert George Hollifield, Sr."

Q. What was the date of that statement, Mr. Pardo?

A. September 26, 1951.

Mr. Richter: You may have the witness.

Cross-Examination, by Mr. Kelley.

Q. As I understood your testimony, Mr. Pardo, yesterday, you have been a special agent with the Bureau for approximately ten and a half years?

A. That is correct.

Q. How long have you been assigned to the Cincinnati office?

A. Since January 24, 1949.

Q. Would you state again the circumstances which impelled you to go to the O. S. I. office at Wright Field and interrogate Mr. Hollifield?

A. Well, I was in Dayton, Ohio at the time I received a telephone call from my superior in Cincinnati asking me to go out to the O. S. I. office and talk to Mr. Hollifield.

Q. Did you, at that time, know who Mr. Hollifield was?

A. No, I didn't.

Q. To your knowledge, was he then a subject of an investigation?

A. I didn't know anything about it at that time.

Q. Where were you when you got that call?

A. I was in the resident agency office in this building.

Q. And who was your superior who called and directed you to go to the Field?

A. Alvin E. Ostelhoff, Special Agent, F. B. I., Cincinnati.

Q. He was then in charge of the Cincinnati Office of the agents within this immediate vicinity?

A. That is correct.

Q. Is Mr. Ostelhoff still with the F. B. I.?

A. No, he is not.

Q. He left the F. B. I. to take employment with Cappel-McDonald Corporation, didn't he?

A. Well, I understand he is with them. That is about all I know about it.

Q. When did he leave the F. B. I.?

A. I don't know the exact date. I can only give you an approximate date.

Q. Give us the approximate date?

A. Approximately November 1, 1951.

Q. Which would have been, roughly, a month after he directed you to interrogate Mr. Hollifield?

A. That is approximately correct.

Q. A month and a day or two. Do you recall during your interview with Mr. Hollifield precisely what he said, as to when and where he first made the acquaintance of Mr. Opper?

A. Why, he told me he couldn't recall where it was. He was it was approximately a year ago that he first met him, from the time I interviewed him.

Q. You have interviewed many men and women in your time, I presume?

A. Yes.

Q. Where the phrase was used "approximately a year ago," do you, as an investigator, accept that to be an indication of an exact date, or a wide approximation?

A. I didn't understand all of that question.

Mr. Kelley: Read the question.

(Thereupon the last Q. was read by the reporter.)

A. Well, I attempted to get as nearly a correct date as I could. Mr. Hollifield stated he couldn't give me that date and that was all I had was an approximation and that was all I could get from him.

Q. Now, aside from being refreshed by the contents of the document from which you just read excerpts, do you have an independent recollection of when it was, that is, the time that Mr. Hollifield said that an agreement was reached between himself and Mr. Opper concerning the payment of $1750?

A. Well, there again he was very indefinite as to the time and he said he couldn't remember the date, but the best he could do would be around nine months prior to the time I talked to him, which would be as he put it sometime around the first of the year 1951.

Q. In other words, around the first of the year, that would be somewhere in the month of January of 1951?

A. Well, that was the best that he said he could do.

Q. But that is the date we are talking about now, when he indicated to you that an agreement was made, a proposal, acceptance and an agreement for the payment of $1750?

A. Yes.

Q. Around January 1, 1951, around there?

A. He said that was the best of his recollection, at that time.

Q. And as to the subsequent meeting, I think you said Mr. Hollifield told you he went to Chicago and got some money?

A. That is correct.

Q. Now, what was said as to the date of that visit?

A. Well, he told me again that he couldn't recall the exact date; that he thought it was somewhere around five months prior to the time I talked to him and I asked him, "Well, would that be around April?" And he said, yes, he thought it would be around the month of April 1951.

Q. Do you have any knowledge as to an exact date, knowledge acquired from any source whatsoever, as to an exact date upon which he went to Chicago and received money?

A. I don't of my own knowledge. I have through hearsay information.

Q. Is that hearsay information such as to definitely establish a date that money was received?

A. Well, I have information of the day he went out there and received the money.

Q. You have information that he went to Chicago; isn't that right?

A. Yes.

Q. Do you have information where he went in Chicago, other than what he may have told you in his statement?

A. No, I don't.

Q. So, you know he went to Chicago but you don't know where he went from any source?

A. That's right, only what Mr. Hollifield told me.

Q. You know he returned from Chicago to Dayton; isn't that right?

A. That is what he told me.

Q. Didn't you undertake to investigate the air lines to determine the evidence of the trip to Chicago?

A. I would like to state that I did not handle this investigation.

Q. It was handled by some other agents?

A. Yes.

Q. You have substantially told this Court and Jury the results of your own investigation in this case then?

A. That is correct.

Mr. Kelley: That is all.

Mr. Richter: You may be excused, Mr. Pardo.

The Court: That is all.

EDWARD C. SCHARRER, being duly sworn, testified as follows:

Direct Examination, by Mr. Richter.

Q. Mr. Scharrer, will you state your full name, please?

A. Edward C. Scharrer.

Q. How do you spell that?

A. S-c-h-a-r-r-e-r (spells).

Q. Where do you live, Mr. Scharrer?

A. 31 West Springhill avenue, Dayton 9.

Q. Ohio?

A. Ohio.

Q. What is your occupation?

A. I am a shorthand reporter, free lance.

Q. What training have you had as a shorthand reporter?

A. I was official shorthand reporter of the Common Pleas Court for 25 years, in this county.

Q. Did you take stenographic notes of the proceedings before the Federal Grand Jury, at Dayton, Ohio, on February 25, 1952, at which the defendant Robert G. Hollifield testified?

A. Yes, sir.

Q. Will you read from your notes—

Mr. Kelley: I always felt it customary before a witness would read from such a thing it would be offered in evidence so the parties might make their proper objections.

The Court: Do you have your shorthand notes?

The Witness: Yes.

The Court: Let them be marked Government's Exhibit 39 for identification.

Thereupon said shorthand notes were marked for identification as Plaintiff's Exhibit No. 39.

Mr. Kelley: May I ask one or two questions on the voir dire?

The Court: Yes, sir.

By Mr. Kelley:

Q. Mr. Scharrer, do these shorthand notes comprise a shorthand transcription of everything said by Mr. Hollifield during any and every appearance before this Grand Jury?

A. Yes, they do.

Q. Did you transcribe all of the proceedings before this Grand Jury during this session here in February?

A. Yes, sir, all of them.

The Court: By transcript—

The Witness: In shorthand.

The Court: I think you better have that understood. He means did you take it down stenographically?

Mr. Kelley: I should correct it.

Q. Did you make shorthand notes of everything said during all sessions of the Grand Jury that sat in February?

A. I don't know about that. The reporter of this court was ill several days and I took her place and one day of that time was spent in the Grand Jury where these notes were taken.

Q. Of your knowledge, you can't state that Mr. Hollifield did not testify before the Grand Jury on some other day, is that right?

A. No, I wouldn't know that.

Q. Do these notes comprise testimony of Mr. Hollifield of any one day?

A. Yes, they do.

Q. Have you made a transcription from your shorthand notes of this testimony?

A. Yes, sir.

Q. Where is that?

A. It is in the possession of the government attorneys, as far as I know.

Mr. Kelley: If your Honor please, since this has been offered, we would like the customary opportunity to examine it and in order to do so we should have the transcript. I can't read shorthand. I ask the government to produce it.

The Court: I have no objection. I can't read it either. We will have the transcript of the stenographic notes marked as Government's Exhibit No. 40 for identification. One is the stenographic notes and the other is the transcript in the form that we can all read, I guess.

Mr. Richter: If the Court please, we do not propose to introduce the typewritten transcript.

The Court: I understand. You don't have to. I am only having it marked for identification at this time.

Mr. Richter: All right.

Thereupon said transcript was marked for identification as Plaintiff's Exhibit No. 40.

Q. I show you what has been marked for identification Government's Exhibit 40, will you examine it and state whether or not that fully, completely and accurately reproduces what you have taken in shorthand, appearing in Plaintiff's Exhibit 39 for identification?

A. Yes, it does.

Q. Have you examined it in full to be sure of that?

A. No, but I recognize it from the appearance of it.

Q. You know its contents. I observe that certain portions of that have been underlined in red pencil. Did you do that?

A. No, I didn't.

Q. Do you know who did?

A. I saw one of the attorneys for the government do some of that underlining, but probably not all.

Mr. Kelley: May we ask for a moment or two to examine this, please?

The Court: Certainly.

Mr. Kelley: May we retain this while the witness is testifying?

Mr. Richter: Sure.

Mr. Kelley: As to this, the defendants interpose the same objection that was made and argued on Friday, that it is inadmissible.

The Court: All right. Read it real loud, Mr. Scharrer, please.

The Witness: I was wondering if I should wait for a question.

Mr. Richter: All right. I will give him the question.

The Court: Go ahead.

By Mr. Richter.

Q. Will you read the parts of that confession or statement before the Grand Jury which the District Attorney has indicated you should read?

A. Yes, sir. (Reads)

"Robert G. Hollifield, being first duly sworn, testified before the Grand Jury as follows:

By Mr. O'Donnell:

"Q. State your full name, please.

"A. Robert George Hollifield, Senior.

"Q. Now, what is your age, Mr. Hollifield?

"A. Thirty-seven.

"Q. And how long have you been employed out at Wright Field?

"A. Nine years and ten months.

"Q. And in what capacity did you first start to work out at Wright Field?

"A. I was an engineering draftsman.

"Q. Are you married?

"A. Yes, sir.

"Q. You have children?

"A. Yes, sir; two.

"Q. And what are their ages?

"A. I have a daughter 13, a son 5.

"Q. Now, in recent years, say since the Korean affair started, in what capacities did you work out at Wright Field?

"A. I was an aircraft equippage designer.

"Q. Now, did you in your work at Wright Field have occasion to become acquainted with a man by the name of William J. Opper?

"A. Yes, sir, I did.

"Q. When did you first become acquainted with Mr. Opper?

"A. To the best of my memory it was about November of 1950.

"Q. At the time you became acquainted with Mr. Opper did you know that you—had you worked where it was bringing you in contact with any business at Wright Field in which Mr. Opper was interested?

"A. Yes.

"Q. Briefly and generally state what was the nature of the work or contracts or materials in which you had anything to do with, in which Mr. Opper was interested.

"A. Well, I developed and standardized a couple of different types of survival kits which contained various items of personal apparel for use by aircraft members in the event of bailing out of aircraft to sustain themselves in regions where they might not be—have access to warmth and food and so on and so forth, where they must survive on the equipment they have on their body.

"Q. In other words, it was part of your duty to pass on the equipment that went into these survival kits?

"A. Well, I wrote the specifications, yes, sir.

"Q. And what material was Mr. Opper furnishing that went into those kits?

"A. Goggles.

"Q. Goggles only, as far as you know?

"A. As far as I know.

"Q. Now, he was not what you call a prime contractor, was he?

"A. Not to my knowledge. He was a sub-contractor.

"Q. And who, if you know, had the prime contracts for these survival kits?

"A. Well, there were various contractors that had contracts for these kits: Cappel-MacDonald in Dayton, and Bellknap-Thompson in Chicago had that item.

"Q. Was there a concern by the name of Buchsbaum in it?

"A. S. Buchsbaum & Company; they are in Chicago.

"Q. Now, is this understanding right that I have: a situation that while a man in Opper's field, his field of

supply, was not—could not have prime contracts with the government for these survival kits, you could pass on his material which he had to furnish and okay that to the prime contractor?

"A. That is correct.

"Q. In other words, let us suppose the John Jones Company had the prime contracts. It was up to Wright Field that would okay the Opper goggles to the John Jones Company to go in their kits?

"A. That is right.

"Q. Now, had you been passing on the goggles furnished by Opper's company before you ever saw him in person, do you know?

"A. I don't understand that, Mr. O'Donnell.

"Q. What was the name of Opper's company?

"A. I don't really know what the name of the company was, or whether there was a company, Mr. O'Donnell.

"Q. Now, did you know that this man Opper was furnishing goggles before you ever met Mr. Opper?

"A. No. The first time I met Mr. Opper was at Wright Field and I didn't know that he was furnishing any company with goggles. I don't believe that—he couldn't have furnished any prime contractor with goggles without an okay.

"Q. All right, that is what I am leading up to, that he first talked to you about goggles before you knew he was furnishing goggles, was in a position to furnish goggles?

"A. Yes, sir.

"Q. All right. Now, from that, when was it you first met him?

"A. Oh, to the best of my memory, I think it was about November, 1950.

"Q. Briefly, what was the conversation that you had with him?

"A. Well, he came in my office and told me at that time that he had war surplus goggles which were in accordance with the present specification except—and I never actually knew—I don't actually know whether this ever did

exist, or does exist,—which would be in accordance with the specification, other than with the exception it was new matter, all brand new material instead of war surplus matter. And I don't remember that he brought this up to me at the first time, but at a later time he did. The specification for the goggles calls for two types of goggles. There is Type 1 and Type 2. If I remember correctly, one is for an extreme cold weather lens, that consists of a laminated lens; and the other one is a one-piece glass lens; and the difference in them being the extreme cold temperature requirement of the laminated lens or the Type 1, if I am correct, and the fact that the Type 2 didn't have, or the single piece glass lens did not have an extreme cold temperature requirement.

"Q. See if you can go on without my interrupting you?

"A. Well, as I said, the first time I met Mr. Opper, why I found that that is what he was interested in selling to the government. Later on I found out, through conversation with him and contractors, that he was interested in selling those goggles to the prime survival kit contractors providing they were considered satisfactory by me. And I don't know whether it was the second or third time that I met him. That is when he made a proposition to me whereby if these goggles that he had to sell were satisfactory, that he could make it interesting to me.

"Q. Well now, is it a fact that the specifications called for new goggles?

"A. Not the specifications, no, sir, Mr. O'Donnell.

"Q. Well, there is a question whether or not—I have read in the report,—whether these goggles that went into these kits should have new goggles or if surplus property goggles could be used. Does that enter into the matter in any way?

"A. Inasfar as the kit specifications are concerned, to my knowledge it does. Now, from the contract standpoint I don't know whether that is true or not. That is why I said, Mr. O'Donnell, that I wasn't—I had heard one time that all of this equipment was to be new; but I don't

really know that. I don't really know that. I don't know whether it was ever in the contracts or not because I never read a contract.

"Q. All the specifications said was the goggle, is that true?

"A. Yes, sir; the specification listed the goggle.

"Q. Well, up to this point, up to the point where a proposition, as you call it, was made to you by Mr. Opper, what goggles had you okayed?

"A. Well, there were never any new goggles made by anyone, to my knowledge; there were never any other goggles that went into those kits.

"Q. Well, all right. Now, the goggles concerning which Mr. Opper made a proposition to you—let's speak of them, that is what I have in mind—how did they differ in any respect from the goggles that you had been okaying?

"A. To my knowledge—Now, I hadn't okayed any goggles before that, so I can't exactly answer your question, because prior to the time you are talking about, to the best of my memory I hadn't okayed any goggles. But I can give you an instance where sometime before this the government, instead of—the air force, instead of buying survival kits, assembled survival kits of their own. And they did this in an air force depot and the same goggles were shipped in from other depots and assembled in these survival kits with these other items and used. To the best of my knowledge, the goggles that Opper had to sell and the goggles that the government had previously furnished were no different.

"Q. All right. Now let's just come down to the point. You said a proposal was made to you by him that he would do something for you if you arranged it so his goggles could be used?

"A. That is right.

"Q. Is that correct?

"A. That is right.

"Q. What was the proposition? Give us as near as you can his words to you.

"A. Well, as well as I can remember, his proposition was that I would—I was to receive $1750, providing these goggles were satisfactory for use in these kits.

"Q. Where was that conversation had?

"A. At Wright Field.

"Q. When; about when?

"A. Well, about December or January, 1951; about January, 1951.

"Q. January, 1951. At that time, up until that time, had you okayed or passed any of his goggles?

"A. No, sir.

"Q. How soon after that conversation did you pass on or okay any of his goggles?

"A. I just don't remember how soon afterwards.

"Q. Well, can you give us any idea?

"A. Well, no. I don't remember, Mr. O'Donnell. There was a time that elapsed from the first time that he made this proposal to me and when I okayed the goggles, because he called me two or three times from Chicago and pressured me about when was I going to do it and when was I going to do it; and I told him I would have to run some tests on these goggles before I thought that they were acceptable.

"Q. Now, it seems to me that the figure $1750 was a rather odd figure. Do you know how that was arrived at?

"A. Well, I believe he arrived at it from a figure of—I don't know exactly how he arrived at it. I didn't dicker with him for more or less, and how he arrived at that figure, I don't know. But I remember one time that he said that he had it figured out that it was to be seven cents a goggle. Is that what you mean, Mr. O'Donnell?

"Q. You do remember that, that he at one time sort of calculated on the 1750 amounting to seven cents a goggle?

"A. Yes.

"Q. Well now, did you ever receive any money from him?

"A. Yes, sir.

"Q. Where and when?

"A. Well, I received money from him two or three different times in Dayton, Ohio, and once—

"Q. Well now, let's take it one at a time. All right. What was the first amount of money you ever received?

"A. Fifty dollars.

"Q. Where?

"A. In my automobile, on the way to Dayton from Wright Field.

"Q. When was this, in the morning or noontime, or when?

"A. Well, it was in the middle part of the day. I think it was—

"Q. Where did you meet him that day?

"A. Well, he came out to the Field.

"Q. And you got in your automobile to go some place with him?

"A. I was taking him to the train.

"Q. That is what I wanted to get at. State the conversation that was had between you and him when the fifty dollars was paid to you.

"A. Well, the proposition had already been made at that time but no money had been paid to me and, bluntly speaking, I told him that I could use some money.

"Q. Can you give us the date of the fifty-dollar transaction?

"A. It was early in February or March, I believe, of last year.

"Q. Nineteen fifty-one?

"A. Yes, sir.

"Q. Had you at that time approved his goggle?

"A. I don't remember, Mr. O'Donnell.

"Q. You were taking him to his train when it was mentioned about by you that you could use some money?

"A. That is right.

"Q. And just tell us what happened. Did you take the money out of his billfold or what?

"A. Well, he gave me fifty dollars and made some remark that he didn't have much more money with him or

that he was going on to Indianapolis, I think, and that is all he could give me then.

"Q. Did you express any disappointment that the sum wasn't larger?

"A. I don't believe that I did then, no, sir.

"Q. When was the next time you accepted any money from him?

"A. Well, I don't remember whether it was the next time or not but I got some money from him in Chicago.

"Q. Well, didn't you receive some money other than the fifty dollars in Dayton before you —

"A. Yes; about the second of August I received a couple of hundred dollars from him.

"Q. Was that before or after you went to Chicago?

"A. I think that was after I went to Chicago. That definitely was after I went to Chicago.

"Q. Well now, we have the fifty-dollar transaction. Now my question is, do you remember of receiving from him any other money before you went to Chicago?

"A. Yes. You are trying to get this in sequence?

"Q. Yes.

"A. Yes. I remember I received a couple of hundred dollars from him after that.

"Q. You say a couple hundred. Exactly two hundred dollars?

"A. To the best of my memory, yes, sir.

"Q. Can you fix the date for that?

"A. Well, I believe it was around the first of April.

"Q. And where was that that you accepted the money?

"A. I don't remember.

"Q. Do you remember what brought it about; did you broach the subject to him?

"A. I don't remember, Mr. O'Donnell, that time.

"Q. And you don't remember where you were when he gave you the two hundred?

"A. No, sir, I don't remember.

"Q. Do you recall of one time making the statement to the F. B. I. agents that you were taking him to lunch

on the occasion when this two hundred dollars was—either he was taking you or you were taking him to lunch?

"A. Well, no, I don't recall it, Mr. O'Donnell, but no doubt it is right. I don't remember now.

"Q. Do you think it was about April 1st?

"A. Yes; it wasn't too long after the first time he gave me the fifty dollars.

"Q. Well, when was it that you made your trip to Chicago?

"A. I think that was in May.

"Q. Well now, assuming that this date is correct, or approximately correct, did you receive any more money from him here in Dayton?

"A. Yes, sir, I did.

"Q. Before you took the trip to Chicago?

"A. I don't believe I did before I made the trip to Chicago.

"Q. And do you think it was around the first of May that you went to Chicago?

"A. Yes.

"Q. How long were you gone? Did you take time off from the Field?

"A. No, sir.

"Q. How did you go; over the week-end?

"A. Went up on Saturday morning and came back Saturday evening.

"Q. Did you have an appointment with him, was he expecting you in Chicago?

"A. Yes, sir.

"Q. And how did you make that appointment, by telephone or by letter?

"A. I believe it was by telephone.

"Q. And what did you say to him about your going to Chicago?

"A. Well, I told him I was coming to Chicago and that I wanted to see him. I don't know as I told him—I don't believe that I told him I was coming for an additional payment or money or—probably just an understanding.

"Q. You did go to Chicago?

"A. Yes, sir, I did.

"Q. Did you drive?

"A. No, sir.

"Q. Did you go on a day train or night?

"A. No, sir; I flew.

"Q. Oh, you flew?

"A. Yes, sir.

"Q. And what time did you get to Chicago, approximately?

"A. Well, to the best of my memory it would be about nine-thirty, ten o'clock in the morning.

"Q. And where did you go after you got off the—when you got into the city?

"A. I went down in the loop.

"Q. To his office?

"A. To his office, yes, sir.

"Q. And was he there when you got there?

"A. No, sir. May I smoke?

"Mr. Aug: Yes.

"(Witness lit a cigarette.)

By Mr. O'Donnell:

"Q. Well, April 1st was a Sunday. Is that any help in fixing what the date might have been when you went out there?

"A. No, sir, it does not. But I went up there on a Saturday.

"Q. Well, the first Saturday in May was May 5th. Would that help you in fixing the date?

"A. No, it wouldn't help me in fixing the exact date, but I believe it was right close to that time.

"Q. Well, you got to his office and he wasn't there and I assume you waited until he came?

"A. Yes, sir.

"Q. And when he came did you go into his office?

"A. Yes, sir, I did.

"Q. And what conversation did you have?

"A. Well, we talked about various things; talked about his other special equipment, his line, and generalities, and about this proposition.

"Q. And then what was said, if anything, about money?

"A. Well, I don't recall exactly what was said about money but he gave me a thousand dollars at that time.

"Q. In cash?

"A. Yes, sir.

"Q. Well then, wasn't there some conversation preceding his giving you the money?

"A. Well, no doubt there was but I don't specifically recall what we talked about concerning money.

"Q. What did you go to Chicago for?

"A. To get the money.

"Q. How much money were you expecting to get?

"A. Well, I didn't really know.

"Q. What had you done for him up to this point for which you could expect any money?

"A. Well, for what I stated here before. Now, he came in through a prime contractor with these goggles and they in turn asked if these goggles were satisfactory for use in these survival kits. I felt that they were satisfactory and I feel so—

"Q. Let me ask you this: was there anything wrong with these goggles, in your opinion?

"A. No, sir.

"Q. Would you have okayed his goggles if he hadn't offered to pay you some money?

"A. I believe I would.

"Q. Did the offer by him to you of money influence your decision?

"A. Yes, it influenced my decision. I would like—if you don't mind, I would like to say something, Mr. O'Donnell.

"Q. Say anything that you care to, but I would like you to say everything you can because you know all about this and I know very little.

"A. I admit that the proposition, or the money that

he gave me, did influence my decision, but I would like it to go on record that in my opinion the goggles at that time were satisfactory and I feel so now. I honestly believe in my own mind that irrespective of that I would have considered them, irrespective of the offer. The reason I say that is because I have considered many items as to whether they are satisfactory for use as components of survival kits.

"Q. Well, let's for the sake of argument, now, assume that you had his goggles before you for your okay and you had John Jones' goggles before you for okay; you were of the opinion that Opper's goggles were satisfactory and the government was getting a better deal in the Jones' glasses—I mean in the Opper goggles, than he was in the Jones; but let's assume that Jones had come along and says, 'I'll give you five thousand dollars if you will okay my goggles.' Do you think the five thousand dollars would have influenced you to okay the inferior goggles?

"A. Well, in the first place the goggles—in my mind the goggles are not inferior—they were not inferior.

"Q. Well, I know, but I am trying to find out what influenced you. Would you for any amount have okayed his goggles that you didn't think were fit for these kits?

"A. No. I would like to state that—

"Q. Well now, all right; I am trying to visualize in my own mind what might have happened up there in that office in Chicago. You went there to get paid off for something that you had done for him.

"A. Yes, sir.

"Q. And he knew that you were there—coming there to get paid off, didn't he?

"A. Yes, sir.

"Q. Well now, I think this jury would like to know—have you give them a little picture of what went on there between you.

"A. When I was in his office?

"Q. Yes.

"A. Well, I was there about an hour and we talked

about these goggles and about the different types that he had, and he gave me the money and he talked to me about this other instrument that he was selling and generalities.

"Q. Well, he had promised you $1750.00?

"A. Yes, sir.

"Q. And you had done for him all that you expected to do for him, had you?

"A. Yes, sir.

"Q. And up to this point he had only paid you $250, is that right?

"A. As well as I can recall.

"Q. And then you know, according to this agreement, the proposition you had with him, you had $1500 coming?

"A. That I had $1500 coming?

"Q. Yes, coming. If he promised to give you $1750 and he had only paid you 250, you still had 1700 coming —I mean, 1500 coming?

"A. That is right.

"Q. Well, was anything said between you—did you say, 'I am up here to get my 1500 bucks'?

"A. No, I never said I was up there to get my $1500. No, I never said that. I said I was there to get some money but I didn't say $1500.

"Q. Well, did you say to him, 'I made this trip up here, now I would like a little money'?

"A. Yes, I did say that.

"Q. And what did he say?

"A. Well, he said, 'I went to the bank this morning and that is the reason that I am late and I have got a thousand dollars'.

"Q. Where did he have the thousand dollars?

"A. Well, he had it on his person; I don't know whether it was a pocket secretary or bill fold, but he had it on his person.

"Q. Now, I don't mean to contradict you at all, but my recollection is that the other day in the office you said that he opened a drawer of his desk and pulled out a thousand dollars.

"A. Mr. O'Donnell, I don't believe I said that.

"Q. Well, all right; I am not saying you did. Well, did he have it in a billfold?

"A. Well, I just don't remember that.

"Q. Well, it would seem somewhat to me, Mr. Hollifield, that if some man gave me a thousand dollars in cash last May, within the last year, I would have some recollection of the mechanics of how he did it.

"A. Well, Mr. O'Donnell, I have been questioned by FBI agents quite closely on that and that was five months ago and I don't remember that I was able to tell them any closer at that time, and it should have been fresher in my memory than now, and I don't remember that I was able to tell them any closer than now.

"Q. Did he count off a thousand dollars; did he hand you a pan of money?

"A. I think he handed me the money.

"Q. Did you count it there?

"A. Yes, sir.

"Q. And have you any recollection at all about the denominations?

"A. Well, they weren't real small bills; as well as I remember, ones and fives; because I think that would be quite a thickness of money and I know that I put it in my billfold.

"Q. Well, what he said to you about having been to the bank and that he had a thousand dollars, did you infer from that that he had gone to the bank to get a thousand dollars to give to you?

"A. Yes, sir.

"Q. Well, did you remain with him any length of time after you got the thousand dollars? Did you go to lunch or anything like that?

"A. No, sir; I wasn't with him more than an hour all the time.

"Q. Up to this point had you done for him all that you had expected to do for him?

"A. Yes, sir.

"Q. There were no other contracts in the offing, were there?

"A. Not that I remember.

"Q. Well, now, that is $1250. Did you receive any more money from him?

"A. Yes, sir, I did.

"Q. When?

"A. Well, I received a couple hundred dollars from him about the second of August last year.

"Q. How do you fix that date?

"A. Well, because he gave it to me just prior to when I had a two weeks' vacation and I left on the fifth of August.

"Q. Was that here in Dayton?

"A. Yes, sir, it was.

"Q. Out at the Field?

"A. As well as I can remember—I don't remember where it was but it wasn't at the Field, because he never gave me any money at the Field that I remember of.

"Q. Can you tell the jury any of the circumstances surrounding giving you that two hundred?

"A. Well, I remember that I got in touch with him and I told him that I wanted—

"Q. How did you get in touch with him?

"A. I called him by telephone.

"Q. Put in a call to Chicago?

"A. Yes.

"Q. And you think he came to Dayton purposely to give you the $200?

"A. Well, he said he did.

"Q. Where did you meet him?

"A. Well, he came out to the Field that day.

"Q. When you called him did you say anything about you are going on your vacation and you needed money?

"A. Yes, sir, I did.

"Q. Or anything like that. Was it at the Field he gave you the money?

"A. Sir?

"Q. Was it out at the Field that he gave you the money?

"A. I don't recall that he gave it to me out at the Field, no.

"Q. Do you remember where you were when he gave you the money?

"A. I don't remember that time, Mr. O'Donnell.

"Q. How long were you with him on this occasion on August 2nd?

"A. Well, not more than a few minutes. We had no business to talk about or anything at the Field when he came out.

"Q. That money, I assume, was in cash?

"A. Yes, sir.

"Q. Now, did you ever receive any more money?

"A. Yes, sir.

"Q. When and where?

"A. One other time; in Chicago.

"Q. How much was that?

"A. One hundred dollars.

"Q. When?

"A. Well, that was—as well as I can remember, that was prior to May when I went up there in May; I don't recall exactly when it was.

"Q. I was trying to get these payments in point of time. And you say this hundred dollars was given to you in Chicago?

"A. Yes, sir.

"Q. Prior to the time that the thousand dollars was given to you?

"A. Yes, sir.

"Q. Are you sure about that?

"A. Well, as well as I can recall.

"Q. Well, can you fix any date at all that the hundred dollars was given to you in Chicago?

"A. Well, no, I can't fix a date. I can tell you where.

"Q. Where?

"A. In the Wrigley building restaurant.

"Q. Well now, can you remember, Mr. Hollifield, whether that was before or after you had received the thousand dollars?

"A. I believe that it was after I received the thousand dollars, because at that time my family and myself were spending a week end with my in-laws in Chicago and I went down and had dinner with him, and that was—I believe that was after I got the thousand dollars.

"Q. Would you say it was after the time that you got the two hundred in August?

"A. Oh, no, it was before that time, because that is the last money that I got from him, was in August.

"Q. That is the last money that you got from him?

"A. Yes, sir.

"Q. Making a total of $1550, is that right?

"A. Yes, sir.

"Q. Did you ever ask him for the balance that was due you, the $200?

"A. No, sir.

"Q. How old a man is Opper?

"A. Well, I don't know his age, but—

"Q. Well, just guess at it.

"A. I would say he was about between 45 and 50 years old.

"Q. Did you know any other persons connected with the firm?

"A. No, sir, I never met anyone else.

"Q. Did you ever see his plant or storeroom—

"A. No, sir.

"Q. —whatever he had? Was his plant or storeroom and other facilities that he had ever inspected by the government inspector, that you know of?

"A. I don't know anything about that.

"Q. Is there anything else that you think that would be of enlightenment to the grand jury in connection with your dealings with Mr. Opper?

"A. I don't believe so. That is what I did and that is the money I got.

"Q. Where is Mr. Opper's office?

"A. I don't remember the street.

"Q. You know the building?

"A. No, sir, I don't.

"Mr. O'Donnell: Well, you may leave the witness stand but please don't leave the building, just wait outside."

By Mr. Richter:

Q. Mr. Scharrer, do your notes indicate whether or not the witness was sworn?

A. I have the word "sworn" after his name.

Q. Is there anything else at the beginning of your notes that indicates whether or not he was sworn?

A. No, just that word sworn after his name. That is all I have.

Q. After his name?

A. Yes, sir.

Q. Do your notes show whether or not the witness waived immunity before he gave his testimony?

Mr. Kelley: I object to the question.

The Court: Well, do you know? You may answer the question. Just answer yes or no.

Q. Do you know?

A. Yes.

Q. What do your notes indicate in that connection? Will you read it please?

A. At the very beginning Mr. O'Donnell said: "There will appear to you as a witness, Members of the Grand Jury, a man by the name of Hollifield, and it has been alleged and there has been some statements made by Hollifield to the effect that he has accepted moneys from a man by the name of Opper."

Q. Mr. Scharrer, what we are interested in—

Mr. Kelley: Just a moment.

Mr. Richter: For the purpose of saving time, I wanted to direct his attention to the specific—

The Witness: I found that place now.

Q. All right. You may proceed.

A. This is also by Mr. O'Donnell: "Mr. Hollifield, the grand jury is about to hear evidence investigating a case involving William J. Opper and yourself. Now I advise you that under the Constitution you have a right, if you care to exercise that right, of refusing to testify if in your opinion your testimony might tend to incriminate you. Now, at the instant time we are referring to your connections with a man by the name of Opper only. Are you willing to testify concerning your relations with Mr. Opper?

"A. Yes, sir.

"Q. (Handing paper to the witness) Read that please.

"A. I hereby waive all rights of immunity and consent to testify in the matter being investigated by this body and hereby request said grand jury to hear me in the interest of truth."

"Q. Are you willing to sign that?

"A. Yes, sir.

"Mr. Aug: The matter is designated 'In re: William J. Opper'."

Mr. Richter: That is all. You may have the witness.

Mr. Kelley: No cross-examination.

Mr. Richter: That is all, Mr. Scharrer. We have another witness if the Court desires to proceed at this time.

The Court: Yes.

Mr. Richter: All right. Mr. Regan.

And thereupon

MR. FRANCIS A. REGAN, being duly sworn, testified as follows:

Direct Examination, by Mr. Richter.

Q. Will you state your full name?

A. Francis A. Regan.

Q. What is your address, Mr. Regan?

A. Chicago, Illinois.

Q. What is your occupation?

A. I am a public accountant.

Q. What were you prior to becoming a public accountant?

A. Special agent of the F. B. I.

Q. When did you terminate your employment by the F. B. I.?

A. October 27, 1951.

Q. How long prior to that time had you been an F. B. I. agent?

A. Since May 27, 1940.

Q. Have you ever met the defendant Robert G. Hollifield in this case?

A. No.

Q. You say you have never met him?

A. I have not.

Q. Beg your pardon. William J. Opper?

A. I have.

Q. Can you point him out in this court room by stepping down and placing your hand on his shoulder?

A. (Witness leaves the witness stand and puts his hand on defendant William J. Opper's shoulder.)

Q. All right.

A. (Witness resumes the witness stand.)

Q. Have you ever had any conversations with the defendant William J. Opper?

A. Yes.

Q. When?

A. On three occasions: October 10th, 12th and 16th, 1951.

Q. Starting with the first conversation, where was that?

A. In the office of the F. B. I., at Chicago, Illinois.

Q. Who was present at the time besides Mr. Opper?

A. Besides Mr. Opper, there was an agent John Donaldson, assigned to the Chicago office, and myself.

Q. Will you relate to the Court and Jury the preliminary

discussions that you had with Mr. Opper on that occasion, October 10th?

A. When Mr. Opper first appeared in the Chicago office, I identified myself and Mr. Donaldson, as agents of the F. B. I. I told him that we were interested in discussing with him any transactions that he may have had with a Robert Hollifield. I told him that anything he would tell us would be voluntary on his part; that he was not compelled in any way to tell us anything; that the details of the transactions that were involved we were not acquainted with, and that it was possible that in describing these transactions that he could involve himself in something and that he should be aware of that.

Q. What did he say, if anything, at that time?

A. He said that he understood that he was there on a voluntary basis and that what he told us would be voluntary on his part.

Q. What time of day was this, on October 10th?

A. On October 10th that would be in the morning.

Q. Do you remember about what time of the morning?

A. Not exactly, no, sir.

Q. Roughly?

A. Approximately 10 o'clock.

Q. Now will you relate to the Court and the Jury the substance of the conversation that you then had with the defendant William J. Opper?

The Court: Just a minute. Now, Members of the Jury, anything Mr. Regan may testify to, if such there be,—of course, I don't know what he is going to testify to any more than you do. However, if in his testimony there are any statements made by Mr. Opper concerning Mr. Hollifield then I say to you now, as strongly as I did before, that you are not to consider those statements as against the defendant Hollifield. You may consider them in your consideration of the case, in arriving at your final conclusion as to the defendant Opper himself. Anything that he may have said about himself in connection with these matters, if he did say anything, that, of course, you

should take into consideration giving it such weight as you deem it properly deserves, but as against the other defendant Mr. Hollifield, you must not give it any consideration as against Hollifield. In other words, they each occupy exactly the same position. Whatever they state about themselves, that you have the right to consider, if you so see fit to do, when you come to consider the case. But what either one may have said about the other, that you cannot consider as testimony against the other. Do I make myself clear?

Let me ask this question. I always want to do this first and it always slips my mind. Mr. Hollifield was not present. Was Mr. Hollifield present at any of these conversations?

The Witness: No, your Honor.

The Court: I understand your testimony, so far as you, yourself, are concerned, you don't know Mr. Hollifield?

The Witness: That is right.

The Court: All right. Now you may proceed.

A. I started off the interview by asking Mr. Opper to generally explain his business in Chicago. Mr. Opper told me that up to approximately four years prior to the time of this interview he had been located in Indianapolis, about four years before he had come to Chicago, and during that period of time had engaged in business in Chicago in his own name, William J. Opper, or The William J. Opper Company, and at times as The Chicago Compass Company.

He stated that about two years prior to the time he was interviewed he had gone to Wright Field, at Dayton, Ohio, and left his name at the Field as a possible source of compasses. He said that sometime thereafter he received a number of inquiries from various companies, including Cappel-MacDonald and S. Buchsbaum, of Chicago, relative to these compasses and in substance these

companies requested him to furnish details concerning his product.

He stated that he furnished this information to the companies and on one occasion, while visiting Buchsbaum, in Chicago, Buchsbaum had advised him that included among the items that Buchsbaum was hoping to furnish to the government were some goggles and asked Opper if he could locate some of these goggles.

Opper told me that thereafter he went out and succeeded in locating a supply of these goggles and left a sample at Buchsbaum and Cappel-MacDonald. He stated at first there was some question about the specification on these goggles and he said that to the best of his recollection the question concerned the color of the elastic on these goggles.

Mr. Opper said that the question of the specifications was handled by Buchsbaum and Cappel-MacDonald, not by himself, and that eventually he received orders from these companies for these goggles.

He stated that on one occasion he visited the offices or premises of Cappel-MacDonald and there met a Robert Hollifield. I asked Mr. Opper if Mr. Hollifield had ever solicited or asked for funds, money of any kind. Mr. Opper said, "That is a difficult question to answer. Is there any difference between giving money and loaning money?" I then asked Mr. Opper if he had given money to Robert Hollifield for any purposes whatsoever. Mr. Opper then said that he wished to consult an attorney before discussing the subject any further. With that the interview on October 10, 1951 terminated.

Q. Mr. Regan, did Mr. Opper give the date on which he met Hollifield at the Cappel-MacDonald office in Dayton?

A. He didn't give that date on October 10th.

Q. All right. Well, then when did you see him next?

A. I next saw Mr. Opper on October 12, 1951.

Q. Where?

A. At the offices of the F. B. I., in Chicago.

Mr. Kelley: Excuse me. I don't know if I heard that correctly. Could the last three or four questions and answers be read?

Mr. Richter: All right.

(Thereupon the last three Q's and A's were read by the reporter.)

Q. Who was present on that occasion?
A. On that occasion, Mr. Opper—

The Court: That is October 12th, you mean?

Mr. Richter: October 12th, yes, sir.

A. (Continued) on that occasion, Mr. Opper, John Donaldson and myself were present.
Q. Will you state the preliminary discussions that occurred on that occasion?
A. I told Mr. Opper then, in substance, that we were ready to continue the interview that terminated on the previous occasion.
Q. Will you then relate the substance of the conversation that took place between you on October 12th?

Mr. Kelley: For the record may we state the objection made last Friday and argument last Friday,—same objection.

The Court: Very well. All right. Same ruling, of course, motion to strike and all. Those same rulings to right through. Very well. Go ahead.

A. Mr. Opper, in substance, reviewed identically what he had told us on the previous day. He then said that when he met—that he met Mr. Hollifield at the premises of Cappel-MacDonald for the first time and thereafter had met Mr. Hollifield on approximately fifteen occasions, at Wright Field, at Dayton, Ohio, and at Chicago, Illinois. Mr. Opper said that he first saw Hollifield in Chicago, Illinois, at Buchsbaum's, at which time, to his knowl-

edge, Mr. Hollifield had visited Buchsbaum in connection with expediting some purchases being made by Wright Field. Mr. Opper said that on that day, in the evening, that they, he and his wife went out socially with Mr. and Mrs. Hollifield.

He said that on the next occasion that he met Mr. Hollifield in Chicago was at the offices of his company on East Ohio street. He said that Mr. Hollifield called at his offices alone and on that occasion told him "Bill, I am in some trouble, financial trouble. I need some money. I am about to lose my home. Can you help me out?" Opper said that he told Hollifield he thought he could and asked him how much money he needed. Mr. Opper said Hollifield told him he needed $1200. Opper said that he and Hollifield parted and that he, Opper, went to his residence and there obtained the sum of $1000 in currency. He then went to the restaurant in the Wrigley Building, in Chicago, met his wife there, and later met Mr. Hollifield and Hollifield's daughter. They then had lunch and Opper stated that during the course of the lunch he and Hollifield left the table and went into the wash room, at the restaurant, and in the wash room gave Hollifield an envelope containing $1000 in currency. In substance, I asked Mr. Opper the purpose of this transaction and he stated that it was a loan made upon the request of Mr. Hollifield. I then asked him, being a business man, if that was a businesslike way of handling a loan. Mr. Hollifield, or Mr. Opper, in effect, or in substance stated that he saw nothing wrong with the manner in which the transaction was handled. I asked him if he had ever seen Mr. Hollifield's home. He said that he had not. I asked him if he, of his own knowledge, knew that Hollifield had a home. He said that of his own knowledge he did not know that Hollifield had a home. I asked him if he obtained any security of any kind for this loan. He said he had not. I asked him if he had a receipt or any record to evidence this loan. He said that he had not. I asked him what the ar-

rangement was concerning interest and repayment. Mr. Opper said there was no agreement as to interest, that the loan did not call for any interest and that it was understood that Mr. Hollifield could have up to about two years to repay the loan. I asked him if Mr. Hollifield had ever made any payments on this loan. He said that Mr. Hollifield had not. I asked him if he had ever asked for the repayment of the loan. He said on one occasion he had and that Hollifield said: "I will try to get around to paying it."

Mr. Opper said that approximately two weeks after this meeting with Mr. Hollifield in Chicago, he met Hollifield next in Dayton, Ohio, at which time he was located at the VanCleve Hotel, and shortly before noon he called Mr. Hollifield at Wright Field and, subsequently, Hollifield appeared in the parking lot across the street from the VanCleve Hotel in a car. Opper said that he then rode out to Wright Field with Hollifield, and that either while in the parking lot or during the course of the trip to Wright Field he handed $200 to Hollifield, removing the money from his wallet and handing it to Hollifield.

Mr. Opper stated that this represented the balance of the $1200 originally or previously requested by Mr. Hollifield.

I asked Mr. Opper if there were any records, receipts or anything to evidence this transaction and he stated that there was not. I then asked Mr. Opper if this information that he had given to us could be reduced to writing. Mr. Opper stated that he would prefer to consult what records he might have and to further think about these transactions, in order that he could be more specific as to dates. He stated that he would then call up to the Chicago office of the F. B. I. and furnish the written statement.

That is about the substance of our conversation on October 12th.

Q. Mr. Regan, did Mr. Opper place or fix a date at which he made this $1000 payment, during the course of his statement to you?

A. During the course of our discussions on October 12th, he did not.

Q. Had he done so at the previous meeting?

A. No, sir.

Q. All right. When did you see Mr. Opper again?

A. October 16, 1951.

Q. Who called for the appointment at that time, on October 16th?

A. It is my recollection the day before Mr. Opper called me on the 'phone and stated he would be in the following day.

Q. Now that meeting occurred again at the office of the F. B. I. in Chicago; is that right?

A. That is right.

Q. Who was present?

A. On that occasion Mr. Opper and agent Thomas Wilkes and myself were present.

Q. Nobody else?

A. That is all.

Q. Will you state what, if any, preliminary discussion took place on that occasion?

A. On that occasion Mr. Opper handed me a statement and said that he had prepared the statement based upon his recollection of the transactions.

Mr. Richter: Mark this Government's Exhibit 41 for identification.

Thereupon a statement was marked for identification as Plaintiff's Exhibit No. 41.

Q. Mr. Regan, I hand you Government's Exhibit No. 41—

The Court: For identification.

Q. (Continued) —marked for identification as Government's Exhibit 41 and ask if you can identify that document.

A. Government's Exhibit 41 for identification is the statement which is dated October 16, 1951, which was

handed to me in the offices of the F. B. I., at Chicago, on that date by Mr. Opper.

Q. Whose signature appears on that instrument?

A. This signature appears "William J. Opper" which Mr. Opper identified as being his own signature.

Q. Will you read that instrument to the jury?

Mr. Kelley: Are you going to offer it?

Mr. Richter: We will offer it.

The Court: Any part of that deleted?

Mr. Richter: No.

The Court: Then it may be admitted in evidence and marked as Government's Exhibit No. 41.

Thereupon said statement was admitted in evidence and marked as Plaintiff's Exhibit No. 41.

Q. Will you read that to the jury?

The Court: No. Pardon me. Just a minute.

Mr. Kelley: May the record note the renewal of the objection at this time?

The Court: Oh, yes. That goes in over the objection.

Mr. Richter: You may read it.

The Court: No. Pardon me. I don't want him to read it right now. We are going to adjourn now. It is one o'clock. Now we will recess the further hearing of this cause until 2 o'clock this afternoon. During this interval bear in mind my usual admonition.

Everybody sit down. Court is not adjourned. This is not a moving picture house, you understand, it is a court room.

During this interval bear in mind my usual admonition and return here, if you please, at 2 o'clock this afternoon.

Adjourn court until 2 o'clock this afternoon.

Thereupon the further proceedings in the trial of this cause were adjourned until 2 o'clock of the afternoon of the same day.

Afternoon Session.

Wednesday, May 21, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

(At the Bench, out of the hearing of the jury.)

Mr. Kelley: We know that the government is not required in any way and sometimes cannot indicate about the amount of time that they still expect it is going to take, but we don't want to ask for any continuances when it comes time to put in our case, if that can be avoided by a little discussion in advance. We will have the problem of getting out some subpoenaes and we just wondered if you could give us some idea of when you think we will have to go on with our case, so we could get our subpoenaes out accordingly.

Mr. Aug: It is our hope that we would be through with our case by Friday at the latest.

The Court: The question is, when do you Gentlemen think the government will rest?

Mr. Aug: I think we will rest by Friday at the latest, and perhaps with a stroke of good luck and a brief cross-examination we may finish tomorrow.

The Court: You think they should have some witnesses here on Friday?

Mr. Aug: I would say in an excess of caution, yes.

The Court: On Friday, the 23rd.

Mr. Aug: I would say there is a chance, your Honor, without being committed to it, of course, so far as the

direct examination is concerned, we can finish our case tomorrow.

Mr. Kelley: Some of our witnesses will be from out-of-town.

The Court: I am perfectly willing, of course,—I am very anxious, if I can, to get the matter disposed of before Memorial Day, otherwise we will have to have another long spell in there.

Mr. Aug: I think we would have to take the risk of inconveniencing some witnesses then. We have had ours standing around the halls for days. That is just part of the trial of a case you can't forecast. I would think there is a good chance that they would put on some testimony by Friday.

Mr. Kelley: We don't want to ask too much, but at the close of the government's case I would appreciate at least an hour to deal with some of these cases we haven't yet discussed.

The Court: Now, Mr. Kelley, I haven't the slightest objection, you Gentlemen, all of counsel,—I have no objection, whenever the government finishes, we will adjourn until Monday morning. That will give you plenty of time to discuss your case among yourselves and to line up your witnesses.

Mr. Kelley: We can pretty well assure the Court that within that span we might probably finish by the 30th.

Mr. Aug: Could we have this understanding: In order that we do not waste a lot of time, we anticipate, of course, as you have I know, some kind of motion at the end of our case. If we are at a period of rest, that will give them adequate opportunity to present their motion and us to answer it. I think that should take place on Friday.

Mr. Kelley: Suppose you don't rest until late Friday.

Mr. Aug: Then we will have to go over.

The Court: When the government rests, assuming they do on or before Friday, whatever time it is, I will adjourn the case until Monday morning. If we run into Memorial Day it will just have to run into it. We didn't fix that date ourselves. That was fixed before our time. I can't come down because it is in red letters. Government officials must stay home. You know that, too, Mr. Kelley.

Mr. Kelley: Yes, I do, your Honor. I always thought it was very unfair.

The Court: We will do that, Gentlemen. We are not going to get rushed in the case.

Mr. Kelley: That is helpful. We can get our subpoenaes out for that day.

The Court: That gives you plenty of time.

Mr. Kelley: All right.

(In the hearing of the jury:)

MR. FRANCIS A. REGAN resumed the witness stand and testified further on **direct examination**, as follows:

By Mr. Richter:

Q. Will you read Government's Exhibit No. 41 to the Court and Jury?

A. This exhibit bears the date October 16, 1951; is addressed to "Federal Bureau of Investigation, 105 West Adams Street, Chicago, Illinois. Attention: Mr. Regan. Gentlemen:

"I have been asked to submit a statement relating to my so-called dealings with Robert Hollifield.

"In the winter of 1950, as best I can recall, I was at Dayton, Ohio, then visiting with the firm of Cappel & MacDonald & Company with whom I had numerous business transactions. At the office of this firm I met Mr. Hollifield and in a discussion about things made for the

armed forces, Mr. Hollifield then stated that the next time I was in Dayton to visit him at Wright Field. Sometime later I went to Wright Field and saw Mr. Hollifield and had a social visit with him. We discussed no particular matters of any kind. Sometime later when I visited Mr. Hollifield at Wright Field I discussed with him the possibility of making a wrist compass that was being required by the armed forces as well as using my ¾ inch compass in any future kit. While there I saw photographs of numerous items being used and some of the items seen by me I recognized as items that I furnished to prime contractors.

"Sometime in the spring of 1951 I learned about an objection to a goggle and decided while in Dayton, Ohio, visiting Cappel & MacDonald & Company to discuss the matter with Mr. Hollifield. At that time Mr. Hollifield stated that he did not know what objection was being made and that if I cared to know specifically what that objection was to talk with someone in the optical department. Mr. Hollifield and myself then went to the optical department and I tried to learn what specific objection was being made and was informed that there was some slight difference in the lens specification.

"I wish it to be understood that at no time had I requested Mr. Hollifield to do anything on my behalf. I was making no sale to the government as my sales were at all times confined to prime contractors, who I understand obtain approvals.

"Sometime in the early part of 1951 Mr. Hollifield had been in Chicago and our respective families visited socially. Sometime in April, as best I can recall, Mr. Hollifield communicated with me and indicated that he was hard pressed financially and although I felt no moral or legal obligation to Mr. Hollifield in any manner, I indicated to him that if I could help him I would try to do so. When he visited Chicago he called upon me and stated that the reason for his financial distress was that he had to meet a mortgage on his home of approximately $1200.

Being mindful of the fact that I could help him financially and being charitable I gave Mr. Hollifield $1000 which he promised to repay when he was financially able to do so and a few weeks later gave him $200. I realize now the foolishness of my act but had no motive in so doing except in making him a loan. Very truly yours, William J. Opper."

Mr. Svoboda: If the Court please, I wish again to ask that you admonish the jury in reference to this written statement as to Hollifield.

The Court: Members of the Jury, I don't think it is necessary, but, of course, I like to comply with the request of counsel, and that is to advise you that this is a statement by Mr. Opper and as such you can consider that and any other statements that Mr. Opper made—has made to this or any other witness, if such there be, as against Mr. Opper and give that testimony such weight as you deem it properly deserves, so far as Mr. Opper is concerned, but you must not consider it as any testimony reflecting on Mr. Hollifield, because Mr. Hollifield was not present; it was made in his absence. Mr. Opper can speak for himself just as Mr. Hollifield spoke for himself, but neither one can speak for the other. So, you may consider this testimony along with all the other testimony in the case, as far as Mr. Opper is concerned and as far as he is concerned only and give it such weight as you deem it properly deserves and arrive at your common conclusion and verdict.

Q. Mr. Regan, what occurred after Mr. Opper gave you that letter on October 16th?

A. I first read the letter and then I told Mr. Opper that I didn't believe that the letter in that form was in agreement with the understanding that we had when we terminated the previous interview. I told him that it lacked detail and that I would like to obtain the detail that he had not placed into that letter, in the form of a written statement at that time. Mr. Opper stated that he

felt that the letter in that form was sufficient, that he was cooperative with the investigation and that he did not want to put any further information in writing.

Q. Now, were you proceeding or was there anything else you wanted to say?

A. That is what happened immediately afterward.

Q. What, if anything, was said about the date upon which Opper gave Hollifield, according to that statement, $1000?

A. At that time I examined some documents that Mr. Opper brought into the office, which consisted of bank statements and canceled checks and I asked him approximately what the date was that he had the $1000 transaction with Mr. Hollifield. He said that he recalled that it was on Saturday, in the month of April. I examined his bank statements and noted that on these statements there was one charge or withdrawal in the amount of $1000. I examined his canceled checks and found the canceled checks corresponding with that $1000 withdrawal. That check was one dated April 13, 1951, in the amount of $1000, payable to cash and endorsed by—with the name William J. Opper. I asked him what connection, if any, this $1000 check had with the $1000 transaction with Mr. Hollifield. Mr. Opper stated that it could in part cover the $1000 transaction. He stated that he had the custom or habit of keeping a sum of money in the apartment and that he used funds from this fund to turn over to Mr. Hollifield and he replenished this fund with the proceeds of the check. I noted that the check was dated April 13, which was Friday.

Mr. Opper stated that prior to the visit of Mr. Hollifield in Chicago, he had received a 'phone call from Mr. Hollifield, at which time Mr. Hollifield mentioned a financial problem. Mr. Opper stated that the bank with which he did business, the bank in which he had his account, didn't have banking hours on Saturday and, therefore, the check in question was cashed on Monday. This check in the upper left-hand corner bore a notation "N. Y. Exp."

I asked him the significance of this notation. He stated that that purported to represent "New York expense" and that about that time he had taken a trip to New York. I asked him if the funds withdrawn from the bank by that check were used for a trip to New York and he stated that the check was used to replenish a fund which had been depleted with the $1000 payment to Mr. Hollifield and that about that time or subsequent he took this trip to New York. That is the substance of my conversation on October 16th.

Mr. Richter: Mark this as Exhibit 42 for identification.

Thereupon a photostat of a check in the amount of $1000 was marked for identification as Plaintiff's Exhibit No. 42.

Q. I hand you a check marked for identification—

The Court: It is a photostatic copy.

Q. (Continued) —photostatic copy of a check marked for identification Government's Exhibit No. 42, and ask you if you can identify that as being a copy of the check to which you previously referred.

A. This is a copy of the check to which I referred.

Q. How much is it?

A. This check is in the amount of $1000.

Q. Dated what?

A. Dated April 13, 1951.

Q. Payable to whom?

A. Cash.

Q. Signed by whom?

A. William J. Opper.

Mr. Kelley: Are you offering that? You are reading it into the record.

Mr. Richter: We will offer it in evidence. Do you want to see it?

Mr. Kelley: Yes. May I inquire on the voir dire as to this exhibit?

The Court: Yes, certainly.

By Mr. Kelley:

Q. Mr. Regan, a few moments ago I undertook, while listening to your testimony in one respect to write down exactly what you said. As I recall it, when you asked Mr. Opper concerning what happened to the proceeds of this check, and now I quote, you stated that he replied, it could in part constitute payment or repayment to the fund from which he had obtained the $1000. Is that what he said?

A. That is right.

Q. That it could constitute that?

A. He used the word "could".

Q. He didn't say that it did?

A. No, sir.

Q. There is nothing on this document—nowhere on that document is there anything to indicate any connection with Mr. Hollifield, is there?

A. I see nothing that I can recognize.

Q. Now, you undertook to fix the date, that Mr. Hollifield made a trip to Chicago, in April, did you not?

A. Could you repeat that question?

Q. You undertook to establish the date that Mr. Hollifield made an airplane trip from Dayton to Chicago in April of 1951?

A. I know nothing about such a plane trip. I undertook to establish the date that the $1000 transaction took place.

Q. Did you not then or since, did you not bear in mind that the F. B. I. through other agents than yourself had interrogated Mr. Hollifield and had determined that he took an airplane, T. W. A., from Dayton to Chicago, on the 14th of April?

A. I don't believe I knew that.

Q. You didn't know that then?

A. I don't believe I knew it up to now.

Q. Obviously that check was not cashed until after the 14th of April; isn't that true?

A. That is right.

Q. When was that check cashed?

A. This check was cashed on the 16th of April.

Q. What does it show on the back?

A. It bears a clearing-house stamp of the National Boulevard Bank, April 17th.

Q. You interviewed officials of that bank, did you not?

A. I did not.

Q. Someone from your office did, as far as you know, didn't they?

A. To my knowledge, they could have.

Q. Do you notice the date of April 16th on there, on that check?

A. Specifically, no, sir.

Q. Well, I mean specifically, is the date April 16th anywhere on that check?

A. No, sir.

Q. Then why did you say it was cashed on the 16th?

A. I had two reasons for saying so. One is the charge appeared on the bank statement dated the 16th, and the other is that the banking policy, which in substance is that a clearing-house stamp bears the next date. A check stamped on the 16th would bear the date of the 17th.

Q. That is subject to a rare exception, is it not, that it might bear the same date that it was cashed?

A. Within my experience, I know of no exceptions.

Q. The fact remains, that check was not cashed until two days after the 14th of April; that is to say, the 16th of April.

A. That is right.

Mr. Kelley: We object to the introduction of the check, in that it doesn't tie up with the defendants.

The Court: The objection is overruled. The check is admitted in evidence. Whether or not it is a circumstance that tends in any way to show anything in this case, is a question entirely for the jury to determine. You may take what proof there is about it and the check and you may decide, Members of the Jury, what relationship, if

any, that check has to the statement that this witness has testified Mr. Opper made, both orally and in writing. It is offered merely as a circumstance for your consideration, to be given such weight by you as you deem it properly deserves. It is admitted in evidence and marked as Government's Exhibit 42 in evidence.

Thereupon said photostatic copy of check of $1000 was admitted in evidence and marked as Plaintiff's Exhibit No. 42.

Mr. Richter: Mark this for identification as Government's Exhibit No. 43.

Thereupon a photostatic copy of a bank statement was marked for identification as Plaintiff's Exhibit No. 43.

Q. Mr. Regan, you referred to a bank statement. Now, where did you get such a bank statement?

A. I obtained the bank statements from Mr. Opper.

Q. What did you do with it when you got it?

A. I asked Mr. Opper if he had any objections if I had photostatic copies made of the bank statement and check. He said he didn't and I then had another agent take these documents to the machine in the Chicago office and they made photostatic copies of the statements and the originals and photostats were then brought back to me and I returned the originals to Mr. Opper.

Q. Did you check the photostats against the originals?

A. I did.

Q. I hand you an instrument marked Government's Exhibit 43 and ask you if you can identify that as the photostatic copy of the bank statement which you received from Mr. Opper?

A. That is a little difficult. I can identify the statement covering the month of April.

Q. Well, the statement covering the month of April. Limit it to that.

A. I recognize that as the copy of the original document that I examined in the Chicago office.

Mr. Richter: If the Court please, we offer in evidence so much of this statement as applied to the month of April 1951.

Mr. Kelley: First, we object to its introduction at all for the same reasons we objected to the check; secondly, we object to its being introduced in part and confined to the month of April. We feel if it should go in, it should be present in its entirety. O.. objection primarily goes to their admission in the first place.

The Court: Let it be marked Government's Exhibit 43 in evidence, the whole document. Now, you may read such portions of it as the government cares to bring out at this time, or all of it, if you please, and the other side may do the same.

Thereupon said statement was admitted in evidence and marked as Plaintiff's Exhibit No. 43.

Q. Mr. Regan, will you address yourself to the sheet of this statement referring to the month of April 1951 and direct the attention of the Court and the Jury to the specific item about which we have been talking?

A. The specific item is one in the amount of $1000, in the first column bearing the title "Checks and other debits listed in order of payment," and is opposite the date, April 16, 1951.

Q. Is that all with relation to that item?

A. It is in the amount of $1000.

Mr. Richter: You may have the witness.

Cross-Examination by Mr. Kelley.

Mr. Kelley: Would the Court give me one minute, please, to go over my notes?

The Court: Certainly.

Q. Mr. Regan, as I understand it, you interrogated Mr. Opper on three occasions, October 10th, 12th and 16th in 1951?

A. Yes.

Q. That is correct, and on no other occasions?

A. On no other occasions.

Q. During the course of those three interviews, did you maintain a log?

A. One was prepared immediately thereafter.

Q. Immediately after each meeting?

A. Yes, sir.

Q. Do you have that with you?

A. I do not.

Q. Where is it?

A. I don't know.

Q. When did you last see it?

A. When I was an employee of the F. B. I. I will take that back. I have seen it since then.

Q. Where was it when you saw it?

A. In the office of the F. B. I. in Dayton here.

Q. Here in Dayton?

A. Yes, sir.

Q. And that was when?

A. Approximately a week ago Tuesday.

Mr. Kelley: We request the government to supply the log.

Q. Did you keep any notes in addition to the log,—make any notes during the course of the interviews themselves?

A. The agent who accompanied me and assisted me in the interview maintained some notes.

Q. In the first interview that would have been special agent—

A. Donaldson.

Q. Where is he today?

A. In Dayton.

Q. Is he assigned here?

A. No.

Q. He is here in connection with this trial?

A. Yes, sir.

Q. You don't have, of course, those notes?

A. I don't, no.

Q. Mr. Donaldson's?

A. No, sir.

Q. Was the same thing true as to the making of the notes during the interrogation of October 12th?

A. Yes, sir.

Q. They were made by your associate?

A. Yes, sir.

Q. That was Mr. Donaldson, I think, then too?

A. Yes, sir.

Q. But there was another associate agent on the 16th?

A. On the 16th there was, but it is my recollection no notes were made.

Q. By either yourself or that agent?

A. Yes, sir.

Q. Now, I think that you stated that during the course of your conversations with Mr. Opper, he told you that approximately two years prior to the time that you were speaking to him, that he had been to Wright Field and had left his name at the Field. Would you state that again? What did he tell you in that respect?

A. He stated that he called at Wright Field for the purpose of leaving his name or identity as a source of compasses.

Q. Did he tell you that at or about, or shortly prior to the time that he so called at Wright Field, which I take it would have been in 1949, if it was two years before your conversation,—did he tell you that he had purchased the dies required in the manufacture of a compass that had been owned and used by the Waltham Watch Company in making compasses?

A. In substance, he did make reference to such a transaction, but it is my recollection that he mentioned he was in partnership, or somehow joined in that transaction with another individual, who later bought out his particular interest in the manufacturing operation. But I recall a reference to such a transaction and the name of the Waltham Watch Company.

Q. And did you understand from what he said about his visit to the Field, approximately in 1949, that he was making it clear that from then on he was able to supply that compass that Waltham had theretofore supplied the government, when it needed compasses?

A. No, sir. He made no reference to supplanting or replacing Waltham as a source of supply.

Q. But you did understand that he went out to the Field to state that "I, Opper, can furnish some compasses"?

A. Yes, sir.

Q. And you didn't associate that with his purchase of the Waltham dies?

A. No, sir.

Q. Did he tell you that Waltham had manufactured compasses and furnished them to the government prior to the time he bought these dies?

A. No, sir.

Q. Now, he did state, however, I believe, as you testified, that at sometime he received inquiries from various manufacturers or contractors, or would-be contractors, inquiring as to his ability to furnish a compass. Did you testify in substance to that?

A. Yes, sir.

Q. Would you enlarge upon it and tell us how that subject came up and what you said and what Mr. Opper said about that?

A. He said he received such inquiries and among the companies making the inquiries were Cappel-MacDonald, S. Buchsbaum.

Q. Did he mention the names of several other companies who he also received some inquiries from?

A. I can't recall any specific names, if he mentioned any others. I recall those names.

Q. He said he received inquiries, among which were inquiries from Buchsbaum and Cappel-MacDonald. Isn't that the way you put it this morning?

A. Yes, sir.

Q. Did he fix the time? Confine ourselves for the moment when he received such inquiry from the Buchsbaum or Cappel-MacDonald Company. Did he suggest the time when he got such an inquiry?

A. He suggested it by stating it would be not longer than two years previous and not later than October 1950.

Q. What led you to believe it wouldn't have been later than October of 1950?

A. He stated that October 1950 he met Hollifield at Cappel-MacDonald where he called in connection with his compasses.

Q. I intended to ask that. I think it was overlooked this morning, as to what date he finally said he met Mr. Hollifield. I believe it was asked on one of the first interviews. He didn't give the date but he did finally tell you the date he met Mr. Hollifield in the place.

A. He mentioned the month of October.

Q. And although he mentioned the month of October, he mentioned no date?

A. That is right.

Q. Mention the place?

A. Cappel-MacDonald.

Q. In Dayton?

A. In Dayton.

Q. So that is how you assume it wouldn't have been later than that?

A. Yes, sir.

Q. So, thus having received inquiries, did he tell you that when he received an inquiry from the Cappel-MacDonald Company about his ability to furnish a compass that he had no personal acquaintance with anyone in that concern when he got that inquiry?

A. He didn't mention that.

Q. To be more specific, I believe you testified that he called upon Mr. Buchsbaum, after Mr. Buchsbaum had made inquiries of him concerning the compass?

A. Yes, sir.

Q. And that during that interview, when he came to

see Mr. Buchsbaum, at Mr. Buchsbaum's request, Mr. Buchsbaum told him that among the other components that these kits would require would be some goggles; is that right?

A. Yes, sir.

Q. And that Mr. Buchsbaum asked him, Mr. Opper, if he could look around and see if he could find such goggles. Correct?

A. Yes, sir.

Q. And that Mr. Opper said he would try and that, as you put it, he did secure some samples of goggles?

A. Yes, sir.

Q. Did he tell you then that he turned over to Mr. Buchsbaum a sample of such goggles as he was able to locate in the market?

A. Yes, sir.

Q. Did he also tell you that of those samples, he furnished Cappel-MacDonald with some?

A. Yes, sir.

Q. You understood that as of that time when inquiries were made of him about a compass by Buchsbaum, Cappel-MacDonald and others, that the bidding was in the process?

A. Bids were in the process.

Q. Being made for certain kits out here at the Field, you understood that, did you not?

A. I understood it to the extent that Mr. Opper stated that these companies were asking him for quotations on these compasses which would be a component part of these kits.

Q. Did you understand that at the time they were asking him for quotations, that they had contracts, or were getting the bids ready to submit, in order to get a contract, or didn't you know about that?

A. It would be my understanding, if I gave it a thought at the time, that the bids would be in the process of being assembled.

Q. And that there would be various people interested

in the same item, those people being prospective bidders—right?

A. That could be.

Q. Now, did he in that respect tell you—I think you said he stated he also furnished a sample he had been able to obtain to Cappel-MacDonald?

A. He furnished a sample of the goggles to Cappel-MacDonald.

Q. You understood there were two kinds of goggles, sun goggles and ski goggles, didn't you?

A. I recall Mr. Opper making such a reference to a difference in goggles that he did not pursue any further, during the course of the interview.

Q. And you didn't ask or learn whether it was a ski goggle sample or a sun goggle sample, or both, that he submitted to Buchsbaum?

A. I didn't ask him and I can't recall him telling me.

Q. The same as to the samples he submitted to Cappel-MacDonald?

A. Yes, sir.

Q. Now, he did tell you more about the samples that he furnished to Cappel-MacDonald, in the sense he told you how he obtained them from him, did he not? In other words, the manner and means by which he delivered samples to Cappel-MacDonald of goggles?

A. I can't recall specifically discussing that with Mr. Opper.

Q. Will it refresh your memory if I mention or suggest to you that Cappel-MacDonald sent an airplane to Chicago especially to pick up these samples a day before the bids were to close?

A. No, sir, he didn't tell me that.

Q. You didn't discuss that at all with Mr. Opper?

A. No, sir.

Q. Did Mr. Opper state to you that the goggles, that the sample goggles he had furnished to Cappel-MacDonald were by them taken to the Field and shown to the men in the Land Survival Unit?

A. He stated that was done by Cappel-MacDonald and Buchsbaum.

Q. Didn't he indicate that it was first taken by Cappel-MacDonald and that the goggles were found not satisfactory, because they didn't have an extra plastic lens in the case?

A. No, sir.

Q. He didn't distinguish the visit of Mr. Buchsbaum or Cappel-MacDonald in connection with securing approval?

A. No, sir.

Mr. Richter: May it please the Court, I think the cross-examination is going quite a bit beyond the direct testimony.

The Court: I will overrule it. Go ahead.

Mr. Kelley: I felt it was proper to go beyond it within limits of relevancy, your Honor.

The Court: Very well. I have overruled the objection. I can't do any more.

Q. Mr. Regan, you say that you obtained the photostat, which is in evidence Government's Exhibit 42, and the photostat of the bank statement, which is Government's Exhibit 43 in evidence,—that you obtained those, the originals of which these are photostats, from Mr. Opper?

A. Yes, sir.

Q. And with his consent you photostated them?

A. Yes, sir.

Q. Now he brought those documents to your office at your request, didn't he?

A. Yes, sir.

Q. And he appeared willing, at all times, to furnish you with them?

A. He appeared willing on the one occasion that I asked him for them.

Q. You didn't have to get any process to get them, did you?

A. No, sir.

Q. He brought them to you voluntarily and willingly, too, didn't he?

A. Yes, sir.

Q. Told you you could copy from them?

A. He said I might make a copy of them.

Q. Yes, photostats. He let you do that without objection?

A. Yes, sir.

Q. Since his Honor admitted the entirety of Plaintiff's Exhibit 43, you may refer and because you were asked about it—I don't suggest anything more than that—you were asked about a $1000 check that appears on there. Now look at all of them and tell me whether in the amount of $1000 that would appear to be an unusual transaction for Mr. Opper.

Mr. Richter: If the Court please, the instrument speaks for itself.

The Court: Do you object to it?

Mr. Richter: Yes, we will object to it.

The Court: Sustain your objection. You are asking this man to give us his opinion about what appears there.

Mr. Kelley: I will withdraw it as an opinion. The witness was permitted to look at the document in evidence and say what was on it as to the $1000.

Q. Will you go through that, please, Mr. Regan, and whenever you find a check that cleared that account in the amount of $1000 or more, will you state it and give its date?

The Court: That is all right. You may do that.

Mr. Richter: I object to that as being immaterial to the issues in the case.

The Court: Of course, the whole document is in evidence and, therefore, it is all in evidence whether the witness answers these questions or whether he doesn't. If

you wish to ask him that, you may do so. The jury will take it all and they will have it in their jury room and they can see for themselves. Nevertheless you may answer the question, if you can. See if you see any other checks.

Q. For $1000 or more?

A. $1000 or more?

Q. Yes.

A. If I read those $1000 or more, that would take about fifteen minutes.

Q. There are a lot of them.

The Court: That is all right. Take all the time necessary.

Q. There are many items of $1000 or more there?

A. I counted seven items of $1000 in nine months.

Q. But you didn't look at the ones for more than $1000?

A. Numerous for more than that.

Q. That is sufficient for my purpose, since it is in evidence. I was confused. I don't know whether I heard correctly or not, in recalling something that Mr. Opper said about first meeting Mr. Hollifield in Mr. Buchsbaum's office. By that you mean the first time you ever saw him in Chicago?

A. I believe that I so testified. The first time he met Mr. Hollifield in Chicago was at the office of S. Buchsbaum.

Q. Did he fix the date of that?

A. I can't recall the date, if he so fixed it and I don't believe he did.

Q. He did state that Mr. Hollifield was in Chicago on business with Buchsbaum; is that right?

A. Yes, sir.

Q. On which of the three interviews did you put a question to Mr. Opper as to which he responded he would like to talk with his lawyer before talking further on that subject?

A. That was at the end of the first interview, October 10th.

Q. That was the end of the first interview. And thus after having talked with his lawyer, it was after he talked with him that he came back twice and willingly furnished you with his bank statements?

The Court: Do you know whether he talked to a lawyer or not? Did he tell you he talked to a lawyer?

The Witness: It is my understanding.

The Court: Not your understanding. Did Mr. Opper tell you he talked to a lawyer?

The Witness: My recollection is so hazy on that, I couldn't say.

The Court: The reason I say that is, the question presupposes that is what he had done. If you want to ask him the question whether he saw a lawyer. You assume in there that is what he had done. I don't think that is a fair question.

Q. You won't say, Mr. Regan, that he didn't tell you he talked to a lawyer between the first and second conversations?

A. That is my recollection, that he said he did not. I hesitate to say so.

Q. Does the name of any Chicago lawyer come to your mind at any time in your discussion?

A. At no time did he mention the name of any attorney.

Q. You are sure of that?

A. I am positive.

Q. You can't state whether he did or didn't state he had seen his attorney?

A. Because of my hazy recollection, I hesitate to say whether he did or didn't say.

Q. But whether he did or not, he did tell you at one time he wanted to see his attorney before going further with that interview?

A. Yes, sir.

Q. And after that he came back willingly twice?

A. Yes, sir.

Q. And willingly furnished you his bank statement and his checks?

A. Yes, sir.

Mr. Kelley: That is all.

Mr. Richter: That is all, Mr. Regan.

And thereupon

MR. JOHN J. DONALDSON, being duly sworn, testified as follows:

Direct Examination by Mr. Richter.

Q. Will you state your full name, please?

A. John J. Donaldson.

Q. Where do you live, Mr. Donaldson?

A. I live in Park Forest, Illinois.

Q. What is your occupation?

A. I am Special Agent, Federal Bureau of Investigation.

Q. How long have you been a Special Agent, Federal Bureau of Investigation?

A. Almost four years.

Q. Have you ever met the defendant William J. Opper in this case?

A. I have.

Q. Can you step down and place your hand on his shoulder for the purpose of identifying him?

A. I will. (Witness does as requested by counsel.) This is Mr. Opper.

Q. Will you state whether or not you had a conversation with Mr. Opper on or about October 29, 1951?

A. I did.

Q. What did you say to him preliminary to your conversation with him on that date?

A. I advised Mr. Opper—

Mr. Kelley: Excuse me. May the time and place be fixed where this took place and who was present?

Q. Where did this interview take place?

A. The interview took place in the Chicago F. B. I. office.

Q. Who was present?

A. I was present and Special Agent Ralph C. Dalton.

Q. Now will you tell the Court and the Jury what preliminary discussion took place between you and Mr. Opper at that time?

A. I first advised Mr. Opper that anything he said could be used against him, that he had the right to an attorney at the interview, that we make no threats or promises, and we couldn't. He was willing to continue with the interview and I asked Mr. Opper concerning his sales of goods to both Cappel-MacDonald, of Dayton, and S. Buchsbaum and Company, of Chicago. At that time, he furnished me with invoices which he stated reflected his sales to both companies, since September of 1950.

Q. And what occurred after that?

A. After that I asked Mr. Opper if he would be willing to restate the details of his loans to Mr. Hollifield in the amounts of $1000 and $200. He said at that time that he did not desire to restate the details of those loans, that he didn't recall the details as he had related them on prior interviews.

Q. And what occurred after that?

A. I then asked Mr. Opper if he would be willing to give me a signed statement to the effect that the $1000 loan and the $200 loan were the total amount of the loans he had extended to Mr. Hollifield. He stated he saw no objection to giving such a statement, but he desired to consult with his attorney before so doing.

Q. What happened then?

A. Mr. Opper left the office and on November 1st he contacted me by telephone.

Q. And what did he say?

A. He said at that time that he had consulted with his attorney and had been advised it wasn't necessary to give a statement.

Q. Anything occur after that?

A. No, nothing did.

Mr. Richter: You may have the witness.

Cross-Examination, by Mr. Kelley.

Q. The date, Mr. Donaldson of your first—By the way, this wasn't your first meeting with Mr. Opper, was it?

A. No, it wasn't.

Q. You had been present at the interview of October 12th, I think it was.

A. I was.

Q. And you had been present also at the one following that. First I should say October 6th.

A. That is right.

Q. Then October 12th?

A. That is right.

Q. And you were not there on the 16th?

A. I was not.

Q. You had learned he had furnished a statement to the government on the 16th?

A. I had, yes, sir.

Q. Then you saw him again for the third time on the 29th?

A. Yes.

Q. In the presence of John Dalson?

A. That is right.

Q. Was it on the 29th he furnished you with these invoices?

A. It was.

Q. Had you previously or anyone else in the Bureau asked him to bring invoices to that meeting?

A. I had requested.

Q. Did you request him or his lawyer?

A. I had requested Mr. Opper.

Q. Did you telephone him?

A. I telephoned him.
Q. How long before the 29th?
A. Within two days, three days.
Q. And asked him to come down and bring in all of his invoices to Cappel-MacDonald or Buchsbaum?
A. That is right.
Q. And he did just that?
A. He did.
Q. Turned them over to you?
A. He did.
Q. Permitted you to photostat them?
A. He did.
Q. Without restriction?
A. That is correct.

Mr. Kelley: That is all.

Mr. Richter: That is all, Mr. Donaldson.

Mr. Kelley: Could we have a five-minute recess?

The Court: Yes, sir. Take a little recess, Members of the Jury.

Thereupon a five-minute recess was had.

The Court: Call your next witness.

And thereupon

HOWARD HOLTON, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. State your full name, will you, please?
A. Howard Holton.
Q. How do you spell it?
A. H-o-l-t-o-n (spells).
Q. Where do you live, Mr. Holton?
A. Fairborn, Ohio, 436 Wallace drive.
Q. Where are you employed, Mr. Holton?
A. Wright Field.

Q. How long have you been employed at Wright Field?

A. Since November 1945.

Q. When you entered employment in 1945, were you in the military service?

A. I was.

Q. In 1945?

A. Yes, sir.

Q. Now, in what capacity did you act in the year 1945, at Wright Field? What were you doing?

A. I was Chief of the Test Unit, Rescue and Survival Branch of the Personnel Equipment Laboratory.

Q. How long did you continue in that capacity?

A. Until March of 1947.

Q. In March 1947 what were you doing?

A. The personnel equipment lab. was dissolved. We were transferred to the Aero Medical Laboratory and I was assigned as Arctic Test Chief.

Q. That is in 1947?

A. In 1947.

Q. Are you still in the military service?

A. I was.

Q. How long did you continue in that capacity from the year 1947?

A. Until 1950, January 14th.

Q. What happened in January of 1950?

A. I got out of the service and came back as a civilian.

Q. Now, from the year 1947 to January, 1950, did you have the same type duty at Wright Field?

A. No. For 18 months I was designer of new flight feeding equipment, in the Physiology branch of the Aero Medical Lab.

Q. When were you transferred out of that branch?

A. January of 1949.

Q. Is that January 1949?

A. Yes.

Q. Where did you go after January of 1949?

A. I went to school, Aero Technological School, in Florida, for four months.

Q. Then what did you do?

A. I was liaison officer for Aero Medical Laboratory until I was relieved of my commission.

Q. When did this take place?

A. January of 1950.

Q. In January 1950 did you again take up employment at Wright Field?

A. I didn't take up employment until April.

Q. April 1950?

A. Right.

Q. And you were a civilian, is that correct?

A. That is right.

Q. Now, in April 1950, what was your employment at Wright Field?

A. I was hired as designer of aviation equipment in the Aero Medical Laboratory.

Q. Did you go to work in the Aero Medical Laboratory?

A. I did.

Q. How long did you have that employment?

A. Until now.

Q. In October of 1950 where were you employed?

A. I was assigned to the Medical Sanitation Studies and Equipment Unit of the Medical Specialties Branch, Aero Medical Laboratory.

Q. Who was your immediate superior at that time?

A. Major Summers.

Q. Was Mr. Hollifield connected in any way with your employment at that time?

A. Not at that time.

Q. Were you subsequently transferred to Mr. Hollifield's unit?

A. I was.

Q. And when did that transfer take place?

A. Either the last week of October or the first week of November of 1950; it was in that period.

Q. And previous to that Mr. Hollifield was not your superior; is that correct?

A. He was not.

Q. After that time was he your superior?

A. He was.

Q. He was your immediate—

A. My unit chief, yes.

Q. You were, of course, under Mr. Hollifield?

A. I was.

Q. Do you know William J. Opper?

A. I do.

Q. Would you step down off the stand, please, and place your hand, first, on the shoulder of Mr. Hollifield, identify the person in this room whom you know as Mr. Hollifield?

A. (Witness places his hand on the shoulder of Mr. Hollifield.)

Q. Then will you please place your hand on the shoulder of the man whom you know as William J. Opper?

A. (Witness places his hand on the shoulder of Mr. Opper.)

Q. Mr. Holton, can you tell the jury when you first saw Mr. Opper?

A. In the early part of October 1950.

Q. Early part of October 1950?

A. Yes, sir.

Q. Where did you see him?

A. In the Land Survival Unit of the Aero Medical Lab.

Q. Is that Mr. Hollifield's unit?

A. That is right.

Q. At the time were you employed in Mr. Hollifield's unit?

A. I was not.

Q. Did you see Mr. Opper subsequent to this time?

A. Yes.

Q. On how many occasions?

A. Three or four times.

Q. After you started working in Hollifield's unit, which you have placed in the last week of October or first week of November, did you have occasion to have anything to do with the approval of a ski, mountain goggle?

A. I was asked to take a pair of goggles to the Aviation unit to have them checked.

Q. Who asked you to take this goggle?
A. Mr. Hollifield.
Q. Did you take them?
A. I did.
Q. Who did you take them to?
A. Mr. Strand, chief of the division.
Q. What did you do while he was checking them?
A. Took them to his office, gave them to him, asked him if he would check them and took them back to Mr. Hollifield.
Q. Is this all one transaction?
A. All at one time.
Q. How long did this take?
A. No more than a half hour.

Mr. Aug: Mark this 44 for identification.

Thereupon an instrument was marked for identification as Plaintiff's Exhibit No. 44.

Q. Mr. Holton, I will hand you the instrument marked Plaintiff's Exhibit No. 44 for identification and ask you to examine it please.
A. (Witness does as requested by counsel.)
Q. Are you familiar with the signatures on that instrument?
A. I am.
Q. Are you familiar with the signature of Robert G. Hollifield?
A. I am.
Q. And Randall W. Briggs?
A. I am.
Q. And R. H. Blount?
A. I am.
Q. And Walter A. Carlson?
A. Yes, sir.
Q. Now, do you identify a signature on that instrument as being the signature of R. G. Hollifield?
A. I do.
Q. Do you identify a signature on that instrument as being a signature of Randall W. Briggs?

A. I do.

Q. Do you identify a signature on that instrument as being a signature of R. H. Blount?

A. I do.

Q. Do you identify a signature on that instrument as being a signature of Walter A. Carlson?

A. I do.

Q. I will ask you what the subject matter is referred to in this Routing and Record sheet, marked No. 44 for identification.

A. War Surplus Materials, Contract No. AF33(038) 16916.

Mr. Aug: Your Honor, we would like to introduce into evidence Government's Exhibit No. 44 marked for identification.

Mr. Kelley: Just a moment. The only identification of this document so far is the signature on it. Is that all the government proposes to do by way of identification and relevancy to this case?

Mr. Aug: Your Honor, the contract referred to in this instrument is 16916 which has previously been introduced into evidence in this case.

The Court: Very well. It may be admitted and marked Government's Exhibit No. 44.

Mr. Kelley: I would like to state the basis of my objection. It has not been demonstrated to be sufficient foundation or predicate laid for its admission. The relevancy and materiality has not yet been shown.

The Court: Very well.

Thereupon said Routing and Record sheet was admitted in evidence and marked as Plaintiff's Exhibit No. 44.

Q. Now referring to Government's Exhibit 44, I will refer to the initials at the righthand bottom of the instrument, "RGH". Whose initials are those?

A. Robert Hollifield.

Q. "jg"?

A. Jenny Gatti.

Q. I will refer to the symbols "MCREXD-7". Are you familiar with those symbols, Mr. Holton?

A. I am.

Q. What is the meaning of those symbols?

A. It is the symbols of the Medical Specialties Branch, Aero Med. Laboratory.

Q. Are you familiar with the symbols following the word "to", "MCPPXG-43"?

A. It is procurement division.

The Court: You asked him a question, whether or not he was familiar with those symbols. The answer to that is yes or no. Are you?

The Witness: Yes, sir.

Q. And what do the symbols stand for?

The Court: That is the next question.

Q. Have you stated what the symbols stand for?

A. It is a unit within the procurement division.

Mr. Aug: I would like to read Government's Exhibit No. 44 to the jury. The subject of this Routing and Record Sheet is "War Surplus Materials, Contract No. AF33(038) 16916." After the word "From" are the symbols "MCREXD-7. To MCPPXG-43. Attention: Lieutenant J. Mitchell. Comment No. 1.

"1. Reference attached letter from the Cappel-MacDonald Company, Dayton, Ohio, requesting the approval of the following items:

"Compass, Magnetic Pocket.
"Goggle, Ski, Mountain, Type 1.
"Headnet, Mosquito, 17-1944.

"2. This Laboratory has carefully examined the items submitted by the contractor and the samples appear suit-

able for inclusion in the Type E-1 kit. Although the compass is not in exact accordance with the current specification, little difference can be noted. The goggles are in exact accordance with the current specification. The mosquito headnet is in accordance with the current specification except the stiffener ring is a fibrous material instead of metal. This is suitable.

"Walter A. Carlson, Colonel, USAF(MC), Chief, Aero Medical Laboratory, Engineering Division. RGH/jg.

"1 Incl.: Letter from Cappel-MacDonald, dated 10 November 1950.

"Concurrence: R. G. Hollifield, Randall W. Briggs, R. H. Blount."

Q. Mr. Holton, I will hand you Government's Exhibit No. 25, marked for identification, and ask you to look at both sides of the instrument with respect to the signatures contained thereon.

A. (Witness does as requested by counsel.)

Q. I will asr you if you are familiar with the signature of Walter A. Carlson which appears thereon?

A. I am.

Q. Do you identify that signature as being his signature?

A. I do.

Q. I will ask you if you are familiar with the signature of Norris N. Murray?

A. I am.

Q. Do you identify a signature on there as being his signature?

A. I do.

Q. You are familiar with the signature of Robert G. Hollifield?

A. I am.

Q. Do you see a signature on there which you identify as being the signature of Robert G. Hollifield?

A. I do.

Q. Do you see a signature on there of Randall W. Briggs?

A. I do.

Q. Do you recognize it as his signature?

A. I do.

Q. I will ask you to refer to the subject matter of that exhibit and read what the subject of that Routing and Record sheet purports to be.

A. Contracts AF33(038) 17136 and AF33(038) 17438 S. Buchsbaum & Company.

Mr. Aug: If the Court please, we would like to offer in evidence Government's Exhibit 25 marked for identification.

The Court: Same objections?

Mr. Kelley: Well, I prefer to state it. The defendant Opper objects to the introduction of this document at this time because as of this time it has been in no way connected with the defendant Opper whatsoever.

The Court: Overrule the objection. It may be admitted in evidence. The case has to be put in one thing at a time. We can't put everything in at the same minute.

Mr. Kelley: May I ask, is it being offered with the assurance that it is going to be connected up, or is it maintained that it is? I maintain it has not been.

The Court: It is admitted in evidence marked as Government's Exhibit No. 25.

Thereupon said Routing and Record Sheet was admitted in evidence and marked as Plaintiff's Exhibit No. 25.

Q. Mr. Holton, we will hand you Government's Exhibit No. 26, marked for identification, and ask you to examine the signatures contained therein and state, if you are familiar with those signatures?

A. I am.

Q. Is there a signature on there which purports to be the signature of Randall W. Briggs?

A. There is.

Q. Do you identify that signature as his?

A. I do.

Q. Is there a signature on there which purports to be the signature of Norris Murray?

A. There is.

Q. Do you recognize it as his?

A. I do.

Q. Is the signature of Robert Hollifield on that instrument?

A. It is.

Q. Do you recognize that as his signature?

A. I do.

Q. Will you go to the subject of that Routing and Record sheet, Mr. Holton, and state what is the subject?

A. Goggles, sun, Type 1, specification MIL-G-4085.

Q. Ask you to go to paragraph 1 of that exhibit and ask if there is any reference there to goggles?

A. There is.

Mr. Aug: If the Court please, we would like to introduce at this time Plaintiff's Exhibit No. 26.

Mr. Kelley: To which the defendant Opper objects upon the same grounds as were stated with reference to Government's Exhibit 25.

The Court: Very well. It is overruled. Counsel may now mark Government's Exhibit 26 in evidence.

Thereupon said Routing and Record sheet was admitted into evidence and marked as Plaintiff's Exhibit No. 26.

Q. Mr. Holton, I will hand you Government's Exhibit No. 28 marked for identification and ask you to examine the signatures on that instrument and state whether or not you are familiar with those signatures?

A. I am.

Q. Does the signature of Randall W. Briggs appear on that exhibit?

A. It does.

Q. Is that his signature?

A. It is.

Q. And the other signature is Norris Murray?

A. That is right.

Q. Is that his signature?

A. It is.

Q. I will ask you to state what the subject matter of that Routing and Record sheet is.

A. Goggles, Sun, Type 1, Specification MIL-G-4085.

Mr. Aug: We would like to offer this instrument in evidence at this time.

Mr. Kelley: Same objection as to Exhibits 25 and 26.

The Court: Overruled. Mark it Government's Exhibit No. 28 in evidence.

Mr. Kelley: May I pause to raise a point, be excused to talk with government attorneys for a moment?

Mr. Aug: (After conference with opposite counsel) If the Court please, counsel is suggesting that on the back of Exhibit 28 there is another item and other signatures to which I have not referred. So that it is satisfactory with the government if counsel insists that only that portion of Exhibit 28 which is evidenced by the front page be introduced.

The Court: It is all in evidence, just as it stands.

Mr. Kelley: May I inquire? I don't know if the point is made clear. This document is entire on one side and entirely different transaction is on the other. The identification only went to this sheet. Nothing was said about this at all. It has not been identified in any way. My question is, is the front in?

The Court: Do you object to the introduction of that portion of it that is marked—Mark this Government's Exhibit 28, one side 28-A and the other side 28-B.

Thereupon said routing and record sheet was marked one side Plaintiff's Exhibit 28-A and the other side Plaintiff's Exhibit 28-B, respectively, for identification.

The Court: Which side is which? Let counsel see it.

Mr. Kelley: I am familiar with it.

The Court: Which side of it do you object to going in evidence?

Mr. Kelley: I object, of course, to all of it. All that the government has offered is as to 28-A. They haven't undertaken to identify 28-B.

The Court: I understand. Do you object to the introduction of part of it, that marked Government's Exhibit 28-B?

Mr. Kelley: I won't know until I know, has he offered A or has he offered A and B?

The Court: I understand he is offering both.

Mr. Aug: Yes.

Mr. Kelley: In that case, my objection is to both and I add the other ground, there has been no identification at all as to B.

The Court: Now Gentlemen, let's keep our record straight, if you please. The government offers this document in full but there seems to be some objection to a portion of it, one side of it which is marked 28-B for identification. If the defendant objects to the introduction of that side, I will sustain the objection to the introduction of the part of that exhibit marked 28-B and 28-B may be marked for identification only. The other side marked 28-A is admitted in evidence and is now Government's Exhibit 28-A in evidence. The other part is not admitted in evidence at this time.

Thereupon one side of said routing and record sheet was admitted in evidence and marked as Plaintiff's Exhibit No. 28-A.

Mr. Aug: No further questions.

Cross-Examination, by Mr. Kelley.

Q. As I recall, Mr. Holton, you testified on direct examination that from sometime in April of 1950, at which time in the capacity of a civilian you accepted employment at Wright Field as a designer of aviation equipment in the Aero Med. Lab. up to the present time you have continued in that position just described?

A. In December of 1951 we were transferred to the equipment lab., the only difference being transfer for the whole unit.

Q. Is that within the Aero Med. Lab.?

A. No. The equipment lab.

Q. A different lab. on the same level as Aero?

A. That is right.

Q. That took place in December of—

A. 1951.

Q. 1951. During the interval then from April 1950 to December 1951 you were in the Aero Med. Lab.?

A. That is right.

Q. And that lab. is divided into branches?

A. Right.

Q. How many branches?

A. About eight, I believe.

Q. And the branch to which you were assigned was—

A. Medical Specialties Branch.

Q. Now, Medical Specialties Branch is divided into units, is it not?

A. Right.

Q. To which unit were you assigned?

A. The Land Survival Unit.

Q. And that is the unit that Mr. Hollifield was the head of?

A. That is right.

Q. And I believe that you were transferred to that unit, the land survival unit of which Mr. Hollifield was the head as of the last week in October or first week in November of 1950?

A. That is right.

Q. Now, you had had nothing to do with the land survival unit or its personnel up until that time, the last week of October or first week of November. Correct?

A. Not officially, no.

Q. And you had not occupied office space within that unit or a desk within that land survival unit until then, had you?

A. I had not.

Q. Now, you had been transferred to Mr. Hollifield's unit, the land survival unit, before you met Mr. Opper, hadn't you?

A. No, I was not.

Q. How long before you were transferred had you met Mr. Opper? I want you to speak only as to what you are sure of.

A. It was during the month of October, is all I can be sure of.

Q. Would you say it was early in October or late? Are you able to state that?

The Court: What year?

Mr. Kelley: 1950.

A. 1950. It was in the early part of October or within the first week or ten days of October.

Q. Are you positive of that?

A. I am fairly certain of it.

Q. Now what was the occasion that led to your meeting him?

A. I was advised that he had a glycol dispenser he would like to dispose of.

Q. If it were to be suggested to you that Mr. Opper was never at that Field until after the E-1 contract bids had been filed on the 13th of October, would it still be your testimony that you had met him about the 10th, or at a later time?

A. I couldn't be certain.

Q. In other words, you are not certain as to those dates, when you saw him. It could have been after the 13th of October. Correct?

A. Possibly.

Q. Now you say he had a glycol dispenser?

A. Right.

Q. Who had told you that?

A. He told me that when I met him.

Q. How did you meet him and where were you at the Field?

A. I was working in the Medical Sanitation Studies and Equipment Unit, of the Medical Specialties Branch, and it was my job to find instruments or equipment that would sanitize aircraft and this did fall in that category and he knew that I was familiar with that equipment and asked to speak to me.

Q. And I think you told me when I talked to you about this you were then in an office right next door or very close to the land survival unit?

A. Right.

Q. And as I recall, you said someone in the unit communicated the fact that there was a man there who wanted to discuss something in your line?

A. Right.

Q. And you went into the hall and into the next room and there is where you first laid eyes on Mr. Opper?

A. That is right.

Q. And you started to discuss this glycol dispenser?

A. That is right.

Q. That is to kill germs in the air?

A. That is right.

Q. It vaporizes. How long did you talk with Mr. Opper then?

A. Ten or fifteen minutes.

Q. And you understood from that what it was and you made some comment about its unsuitability, did you not?

A. That is right.

Q. Found out up in an airplane, changing pressures, it wouldn't work?

A. It was not adaptable to aircraft.

Q. When the conversation closed on that note, did you leave his presence then?

A. I did. I went back to my office.

Q. Now I recall your stating, Mr. Holton, that Mr. Hollifield at a time when he was your unit chief, gave you a pair of goggles, asked you to take them over to aviation lab. to Mr. Strand?

A. That is right.

Q. We were speaking a little while ago of how the Aero Med. Lab. is first divided into branches, and you were in the Medical Specialities Branch, in the land survival unit of that branch.

A. That is right.

Q. Where was the aviation lab., in that branch?

A. No. It was a branch. Aviation unit is a unit of the Physiology branch.

Q. We have the top Aero Med. Lab. We drop down to branches. We have the Medical Specialities branch in which you were a part.

A. Right.

Q. And on the same level we have the Physiology branch and of the physiology branch there is a unit called the Aviation Lab.?

A. Right. Aviation Unit.

Q. Unit, I should say. Corresponding to your unit but in a different branch. Who composed the Aviation Unit of the Physiology Branch?

A. Captain Strand.

Q. Was he an optometrist?

A. I don't know.

Q. Physicist of some kind, scientist?

A. Possibly so.

Q. Physically, how far was Captain Strand located from your unit at the Field?

A. There was one building separating his building and mine.

Q. And could you go from one to the other and stay indoors?

A. Could not; had to go out.

Q. About how many feet away was his office from your office, approximately?

A. Oh, four or five hundred feet.

Q. Now we have a good mental picture, a recollection of the occasion when Mr. Hollifield asked you to take these goggles over to Mr. Strand. You remember that clearly.

A. Yes, I do.

Q. It occurred very shortly after you were transferred to his unit?

A. Right.

Q. It would have been very close to the last week in October or first week in November, close upon this, possibly a matter of days?

A. That is right.

Q. Was it in the morning, do you recall, or what time of day?

A. I can't recall that.

Q. Would you tell us more fully all that you remember about that? Did he call you over to the desk and talk with you a while about it?

A. He gave me the goggles in the unit, in the office room and asked me if I would take them over to Mr. Strand and have him check them, and I took them, took them across to building 29, to the Aviation Unit, and asked Captain Strand if he would check the goggles and he checked them.

Q. As you recall, that was the very word used, to "check" them?

A. Check them.

Q. He told you to have them checked by Civilian Strand. He is now a captain?

A. That is right.

Q. You were given them to have them checked and you took them to Mr. Strand and asked him to please check them.

A. That is right.

Q. You think that is all you were told?

A. That is all I told him.

Q. Did you, yourself, have any familiarity with the

goggles that were required for inclusion in either the E-1 or D-1 kit, at that time?

A. Only from having used them. Technically had no knowledge of them.

Q. In what sense were you familiar with them? How had you used them?

A. In the service I had used them.

Q. You mean in the field, in the service?

A. Yes.

Q. On foreign shores, in Alaska?

A. In Alaska and other places.

Q. Did you use more than one kind of goggle in Alaska? Did you use both the ski and sun goggle in Alaska?

A. I had no official handling of them. It was just I had used them in my capacity as an officer in the Air Force.

Q. Personally?

A. Personally.

Q. Had you used both kinds, sun and ski?

A. Yes, I had.

Q. So you were familiar with both kinds.

A. That is right.

Q. Which kind was it that Mr. Hollifield handed to you and asked you to take it to Mr. Strand and have it checked early in November or late in October?

A. The ski, mountain goggle.

Q. Now, in appearance, how does that differ from the sun glass, to the naked eye?

A. Ski, mountain is a glass goggle and the sun glass, sun goggle is a plastic, folding.

Q. You say the sun is a plastic folding. The ski doesn't fold?

A. It is hinged at the ends.

Q. To that extent it will fold, on the hinge?

A. That is right.

Q. Does the ski goggle normally come with a case in which it could be folded in place and buttoned down?

A. That is right.

Q. Is that true also of the sun?

A. No.

Q. There is no case with the plastic sun glasses?

A. No.

Q. Since you have mentioned that the ski goggle is glass and the sun goggle is plastic, isn't it a fact that the ski goggle, in its case that holds it, that there is a little slot and that there is an extra or auxiliary pair of plastic lenses with the ski goggle?

A. That is true.

Q. Now were you familiar at that time with any of the different types of ski goggle, or different types of sun goggle?

A. I was not.

Q. You had used both. Actually as a person you had made use of both kinds. When I say "kind" I mean sun and ski. You used both kinds in Alaska, but didn't know each kind was composed of different types.

A. That is right.

Q. And you had used them a considerable period of time up there?

A. Not a considerable period of time; just a day or so total time.

Q. Did you use them for physical comfort in order—for the purpose for which they were intended, to shield your eyes?

A. That is right.

Q. Did you find them satisfactory?

A. I did.

Q. To come back then to that trip. Did you wait, Mr. Holton, there at Mr. Strand's office?

A. I did.

Q. And did he do his checking or whatever he did, did he do that in your presence?

A. He did.

Q. This whole thing took about half an hour?

A. That is right.

Q. That is, for you to take the goggles from Mr. Holli-

field, walked 400 feet to give them to Mr. Strand, to wait for Mr. Strand to get down, all of that took about half an hour?

A. That is right.

Q. How long a time elapsed when you handed them to Mr. Strand before you started back to Mr. Hollifield?

A. Not more than fifteen minutes.

Q. So, Mr. Strand in your presence spent about fifteen minutes checking the goggles?

A. Well, hardly a total of fifteen minutes. We talked in the interim.

Q. He would put aside his work while he conversed with you to some extent?

A. That is right.

Q. Will you tell the Court and jury what you observed Mr. Strand do with the goggles?

A. He took them into his hands, turned them over and looked at them and checked to see that the manufacturing technique was good, that they were not inferior in workmanship, cursory examination. He held them to his eyes and said: "I think they are all right."

Q. Did he look out the window with them?

A. He looked out the window with them and handed them back to me.

Q. He gave it a minute inspection with the naked eye?

A. I said "cursory".

Q. By cursory, he looked at all parts?

A. Well, as much as he could without disassembling them.

Q. He didn't undertake to use any instruments?

A. No.

Q. Did he refer to any specification or photographs or anything of that kind?

A. No, he didn't.

Q. In his conversation with you, did he make any comment on the goggle he was inspecting?

A. He says, "I can't see anything wrong with these." That is about all he said. He said: "I think they are all right."

Q. Did you then return with them to Mr. Hollifield and impart that information, that is to say, that Mr. Strand said he couldn't see anything wrong with them, that they seemed to him to be all right? Did you report that to Mr. Hollifield?

A. I did.

Q. That visit whereby you took the ski goggles to Mr. Strand, Mr. Hollifield requested you ask Mr. Strand to check them, learned they were all right, returned with the goggles to Mr. Hollifield, imparted that information that they were all right, that took place before November 22nd, wouldn't you say?

A. I would say it did.

Q. Now having reference to Government's Exhibit 44 in evidence, the instrument on which you identified Mr. Hollifield's signature and Mr. Briggs', Colonel Blount and Mr. Carlson, that was prepared on the 22nd of November, after you had made the visit to Mr. Strand and reported back that these goggles were all right. Correct?

A. Correct.

Q. And the substance of what this document says being from Mr. Hollifield's unit, Carlson, Hollifield, Briggs, Blount, back to Mitchell, Mr. Mitchell, Lieutenant,—he was in the contracting section, wasn't he?

A. That is right.

Q. And the substance of this is following that test that "This laboratory has carefully examined the items submitted by the contractor." That was Cappel-MacDonald, wasn't it?

A. It says so here.

Q. —"and the samples appear suitable for inclusion in the Type E-1 kit."

A. That is right.

Q. In all of the time that you discussed anything in relation to this goggle with Mr. Hollifield, including the time you went on this errand for him and came back with them, did you observe or sense any impropriety in what he did at all?

A. Nothing.

Q. Did it appear to you to be usual and proper and customary in the function of his duty?

A. It did.

Q. And the same as to Captain Strand?

A. It did.

Q. Mr. Holton, do you plan to continue to be in this vicinity for the next several days?

A. I do.

Q. Next week or two?

A. I do.

Mr. Kelley: That is all.

Redirect Examination, by Mr. Aug.

Q. One question, Mr. Holton: When Hollifield turned these goggles over to you with the request that you go to Mr. Strand with the goggle, did he at that time say anything about a test to see if they met certain specifications?

A. He did not.

Mr. Aug: No further questions.

Mr. Kelley: None.

The Court: That is all. Now, Members of the Jury, we are about to recess the further hearing of this cause until tomorrow morning at 11 o'clock. During this interval bear in mind my usual admonition. Return here, if you please, at 11 o'clock tomorrow morning. Adjourn court until 11 o'clock tomorrow morning.

Thereupon the further proceedings in the trial of this cause were adjourned until tomorrow morning at 11 o'clock.

Testimony of Lieutenant Frederick Moss

Morning Session.

Thursday, May 22, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

LIEUTENANT FREDERICK MOSS, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. Lieutenant, would you state your name?

A. Frederick Moss.

Q. You are with the Air Force, Lieutenant?

A. That is right.

Q. And your rank is lieutenant?

A. That is right.

Q. Where are you stationed?

A. WAAC, Aero Medical Laboratory, Wright-Patterson Air Force Base.

Q. How long have you been out there?

A. In the military since September and as a civilian since November 1950.

Q. What about the year? September what?

A. September 1951.

Q. And before that as a civilian?

A. Yes, from late November 1950.

Q. In the early part of January 1951 were you out at Wright Field?

A. Yes, sir.

Q. And in what capacity?

A. As a project engineer.

Q. In what particular branch or unit?

A. Physiology branch, Aviation unit.

Q. Who was your immediate superior?

A. Mr. Strand.

Q. Can you describe just briefly your duties?

Testimony of Lieutenant Frederick Moss

A. I am project engineer mainly on eye products equipment, sun glasses, goggles and special purpose goggles.

Q. In your formal education have you had any training that would qualify you for holding such a position?

A. Yes, sir. I am a graduate optometrist.

Q. Lieutenant, this is Plaintiff's Exhibit No. 26. It is a Routing and Record Sheet addressed to the attention of Mr. Strand. This sheet refers to some goggles and requests an inspection on the part of your office. I will ask you to take a look at that Routing and Record Sheet.

A. (Witness does as requested by counsel.)

Q. Now did the goggles referred to in that exhibit come into your possession?

A. Yes, sir, they did.

Q. Did you do anything with respect to the request made in that routing and record sheet?

A. Yes. I made out a work order to the materials lab., Physics Branch, asking them to test the goggles for conformance to the specification, with respect to its spectral photometric qualities.

Mr. Aug: Mark this for identification as Exhibit 45.

Thereupon an instrument was marked for identification as Plaintiff's Exhibit No. 45.

Q. Now, Lieutenant Moss, the date of the request to your unit to have the goggles tested, what is the date of that request?

A. 16 January 1951.

Q. I will hand you an instrument marked as Plaintiff's Exhibit No. 45 for identification, and ask you what the date is on the instrument?

A. 17 January 1951.

Q. Will you identify that exhibit?

A. Yes, sir.

Q. Will you describe what it is?

A. Well, it is a work order on which I request this Physics Branch of the Materials Lab. to perform the necessary tests on the goggle. My signature is at the bottom.

Mr. Aug: We would like to offer in evidence, if your Honor please, Plaintiff's Exhibit No. 45.

The Court: Very well.

Mr. Kelley: To which the defendant Opper objects upon the grounds there has been no sufficient predicate established for its introduction. It has not been tied up with the defendant Opper at this time.

The Court: It may be admitted in evidence, marked as Government's Exhibit 45.

Thereupon said work order was admitted into evidence and marked as Plaintiff's Exhibit No. 45.

Q. Now, Lieutenant Moss, did you have any response to this work order?

A. Yes I did.

Q. Whom did you talk to?

A. Mr. Handmaker.

Q. Who is he?

A. He was a project engineer in the Physics Branch of the Materials Lab. who does the spectral photometric work.

Q. Did he tell you the results of his test?

A. Yes, he did. He informed me the results of those tests and I took those results and answered this communication.

Q. Lieutenant Moss, I will hand you Government's Exhibit No. 27 marked for identification and ask you to take a look at it, please.

The Court: No. 27.

Mr. Aug: It is 27. It is not in evidence.

The Court: That is right. Marked for identification.

Mr. Aug: That is correct, your Honor.

A. This is the answer.

Q. Can you identify it, please?

A. Yes, sir.
Q. What is the date on it?
A. 23 January.
Q. What is the instrument itself?
A. This is a communication and answer to the one of 16 January in which we list the results of the test and say that the goggle should be rejected because it did not meet the specification.

The Court: Exhibit 27 is an answer to Exhibit 45; is that right?

Mr. Aug: No, your Honor. The witness has said it is in answer to Exhibit 26.

The Court: That is 27.

Mr. Aug: Is an answer to 26.

The Court: All right.

Q. Is that your signature on this exhibit?
A. Yes, sir.
Q. You are familiar with the signature of Mr. Hein?
A. Yes, sir.
Q. Is that his signature?
A. Yes, sir.

Mr. Aug: We would like to offer in evidence Plaintiff's Exhibit No. 27.

Mr. Kelley: To which defendant Opper interposes the same objection last stated as to Exhibit 45.

The Court: Very well. Objection overruled. It is admitted in evidence, marked as Government's Exhibit No. 27 in evidence.

Thereupon said Routing and Record Sheet was admitted into evidence and marked as Plaintiff's Exhibit No. 27.

Mr. Aug: I would like to read to the jury Plaintiff's Exhibit No. 27. This is a Routing and Record Sheet. The subject: Goggles, Sun, Type 1, Specification MIL-G-4085.

From MCREXDS. To MCREXD-72. Dated January 23, 1951. Comment No. 2.

"1. As requested in paragraph 3, Comment 1, with subject goggles were tested to determine conformity with Specification MIL-G-4085, Goggles, Sun, Type 1.

"2. Tests of the daylight transmission of the lenses were accomplished. The right lens was found to have 28 per cent daylight transmission, and the left lens was found to have a daylight transmission of 26 per cent. Paragraph 3.4.4.1 of the specification stipulates 15 plus or minus 3 per cent for the daylight transmission of the subject lens.

"3. The color of the lenses, designated in terms of chromaticity coordinates, is a neutral shade. The tested lenses are green. The chromaticity coordinates determined for the tested lenses do not fall within the limits stated in the specification, par. 3.4.4.1.

"4. It is recommended that subject goggles be rejected because of the above listed, marked deviations from Specification MIL-G-4085, Goggles, Sun, Type 1.

(Signed) "J. W. HEIN

"Concurrence: F. MOSS."

Q. Now, Lieutenant, after your rejection of the goggle dated January 23, 1951, what next happened?

A. The next thing was Mr. Hollifield called me up and said that he wanted to talk about it and he had some gentleman to bring up to discuss the problem.

Q. What date was this?

A. It was I imagine the 23rd or 24th, or sometime around there, the 25th, very soon afterward.

The Court: What year?

The Witness: Oh, this is 1951, January.

Q. January 1951. Did you talk to Hollifield?

A. Yes, on the telephone.

Q. Did you talk to him personally?

A. Then he came up with three other gentlemen.

Q. This conversation took place where?

A. In our office.

Q. In your office?

A. That is right.

Q. Will you state who was present?

A. Mr. Hollifield, Mr. Murray and two other gentlemen.

Q. Hollifield, Murray and two other gentlemen?

A. And Mr. Strand.

Q. Do you know who any of the two other gentlemen were?

A. Yes, I do.

Q. Do you know a party by the name of William J. Opper?

A. Yes.

Q. Do you see Mr. Opper in this court room?

A. Yes, sir.

Q. Can you step down from the stand and place your hand on the man known to you as William Opper?

A. Yes, sir.

Q. Was he present at this conference?

A. Yes, sir. (Witness places hand on defendant Opper.)

Q. Now we have you, Hollifield, Murray. Did you say Strand?

A. That is right.

Q. And Opper present. Now was anybody else present?

A. There was another gentleman present.

Q. Do you know who that was?

A. No.

Q. You don't know. Now what transpired at this conference?

A. Well, Mr. Hollifield gave certain reasons for possible deviation. In other words, to allow these goggles, as such, to be accepted by the Air Force and we discussed them at length, and, well, we came to the conclusion that Mr. Hollifield should write his—give his reasons in a routing and record sheet and we would answer it.

Q. Did he do that?

A. Yes, he did.

Q. I will hand you Government's Exhibit 28-A and ask you to read the contents of that exhibit?

A. "Subject: Goggles, Sun, Type 1. Specification MIL-G-4085."

Q. Have you finished reading it?

A. Yes.

Q. After having read this, is that substantially a statement of the reasons advanced by Mr. Hollifield as to why your rejection should be changed?

A. Yes, it is.

Mr. Aug: I would like to read Plaintiff's Exhibit 28-A to the jury: Subject is Goggles, Sun, Type, Specification MIL-G-4085. Dated January 25, 1951. Comment No. 2. From MCREXD-7 to MCREXD-8.

Q. Before I go further, Lieutenant, you have just heard me read those symbols ending with -7 and -8. Are you familiar with that -7?

A. Yes.

Q. What does -7 mean?

A. -7 was Medical Specialties Branch.

Q. MCREXD?

A. That was the Medical Specialties Branch.

Q. Who was head of that branch?

A. Major Briggs.

Q. MCREXD-8?

A. That is the Physiology Branch. That is our branch. Mr. Heim was head of that.

Mr. Aug: (Reads)

"1. Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information.

"2. It is pointed out that the item submitted, although not in accordance with the current specification, is for packaging in an aircraft type survival kit. This kit is stowed on multiplace aircraft and the contents are used only in an actual survival circumstance. Further, the percentage of survival kits ever put to arctic usage is very small.

"3. Items in exact accordance with the sample goggle submitted by this office have been furnished as GFE on 15,000 D-1 kits which the Government has packaged. It is also considered that, inasmuch as these goggles are available, and to obtain the goggle per current specification would require their manufacture and an excess length of time, the production of E-1 kits can be expedited. The contractor has also advised that the cost of the goggle per subject specification is $3.30 each, while the cost of the substitute item is $.75 each. This would mean a saving to the Government of $38,250.00.

"4. Your comments are requested.

(Signed) "RANDALL W. BRIGGS.

"Concurrence: NORRIS N. MURRAY."

Initials in the righthand corner "RGH/bgs"

Q. Did this communication reach you?

A. Yes, sir.

Q. Did you take any action on this communication, after it reached you?

A. Yes. We answered it.

Q. You answered it?

A. That is right.

Q. I will call your attention to Plaintiff's Exhibit 28-B, which has been marked for identification, and ask you to take a look at that.

A. (Witness does as requested by counsel.)

Q. Will you identify it, please?

A. Yes. This is—

Q. Can you state what it is?

A. This is an answer to comment 3, which gave the reasons which you just read.

The Court: That is on 28-A.

Mr. Aug: Yes, your Honor.

Q. Are you familiar with the signature of Mr. Heim?

A. Yes, sir.

Q. Are you familiar with the signature of Mr. Strand?

A. Yes, sir.

Q. Are you familiar with the signature of Colonel Blount?

A. Yes, sir.

Q. Can you recognize those signatures?

A. The first two I recognize.

Q. You recognize Mr. Heim and Mr. Strand?

A. Yes, sir.

Mr. Aug: We would like to offer in evidence, if the Court please, Plaintiff's Exhibit 28-B, previously marked for identification.

Mr. Kelley: I object to that upon the grounds at this time there has been an insufficient predicate laid to establish the relevancy and materiality as to the defendant Opper.

The Court: I understand these inquiries came and the answers came after you had a conference at which Mr. Opper was present?

The Witness: The last two, that is right.

The Court: Yes. That is right. I will overrule the objection. It may be admitted in evidence. I understood from counsel yesterday that what was marked as 28-B for identification had something to do with a wholly different matter. That is why we had it marked for identification. I think the record will so show.

Mr. Kelley: What we said was, there had been no identification. It is only this morning that this witness has undertaken to identify the signatures on 28-B.

Mr. Aug: 28-B is in evidence, is that correct?

The Court: Yes. Now that whole document marked 28-A and 28-B, the whole document now is admitted in evidence and marked as Government's Exhibit 28-A and 28-B in evidence, although it is all on one piece of paper.

Thereupon said reply to Comment No. 3, Plaintiff's Exhibit No. 28-A, was admitted into evidence and marked as Plaintiff's Exhibit No. 28-B.

Mr. Aug: I would like to read to the jury the contents of Plaintiff's Exhibit 28-B. (Reads) Comment 4. It is dated 3 February 1951. From MCREXD8 to MCREXD7.

"1. Comment No. 2 dated 23 January 1951 from this office states that tests made by the Vision Unit show the sample goggles submitted under Specification MIL-G-4085 (Type 1) to be not acceptable.

"2. The neutral lens described by the subject specification is considered by this office to be the best available for the purpose intended; however, in view of the exigencies of the present situation as outlined in Comment No. 3 dated 25 January 1951 and the fact that to the best of our knowledge no Unsatisfactory Reports have been received on goggles of the type submitted for approval, it is recommended that the substitute goggle be procured.

(Signed) "J. W. HEIM

"Concurrence: O. T. STRAND

"R. W. BLOUNT."

Through with the witness, your Honor.

Cross-Examination, by Mr. Kelley.

Q. Lieutenant Moss, I direct your attention to Plaintiff's Exhibit 45 in evidence, which you have identified as a work

order issued by yourself. I will ask you to whom did you direct it?

A. Mr. Koch, who at that time was the branch chief, of the Physics Branch.

Q. And did you send anything physical, any attachment or enclosure physically along with the work order to Mr. Koch?

A. Yes.

Q. What?

A. A pair of goggles.

Q. What kind of goggles, sun or ski?

A. Sun.

Q. Sun only?

A. Yes, sir.

Q. Did you physically bring them to Mr. Koch yourself?

A. I think so. I can't exactly say whether I sent them down or hand carried the work order with the goggle.

Q. How far away was Mr. Koch's office physically from yours?

A. Three city blocks.

Q. Had you taken on other occasions some work orders accompanied by specimens to Mr. Koch, in other matters?

A. Probably, at that time. I have taken them since. I don't remember whether this is the first time or whether there were ones before this.

Q. Have you at sometimes carried the samples yourself and at other times sent them by messenger?

A. Yes, sir.

Q. And you are in doubt as to what you did in this particular case?

A. Yes, sir.

Q. If you will refer to Project Title, what does that say?

A. Goggles and Sun Glasses.

Q. Goggles and Sun Glasses. What did you mean by that, if you merely sent along sun glasses?

A. This is a form. It is the project title, the form of title of all the work that I do. On every work order you will find "Goggles and Sun Glasses".

Q. What does it mean, Goggles and Sun Glasses?

A. It means that is the title of the project.

Q. If you have "Goggles and Sun Glasses", does "Goggles" relate to something different than sun glasses?

The Court: Did they?

The Witness: My project, is that what you are referring to?

The Court: Is there any difference? Is there some distinction between Goggles and Sun Glasses?

The Witness: Yes, there is.

The Court: I mean in your report there.

Q. What is that distinction?

A. As I said, this is just a title, the title of the project. All my work is goggles and sun glasses.

Q. Now, I will ask you, since you have testified that in this case you either sent by messenger or personally brought to Mr. Koch sun glasses only—How many pair?

A. One or two, I am not sure.

Q. From whence and from whom and when and where did you obtain that one or two pairs of sun glasses?

A. I got them with the R and R that was read before, requesting a test.

Q. By that you are referring to Government's Exhibit 26; is that right?

A. That is right.

Q. Did you get that by messenger or did somebody bring Exhibit 26 along, plus the one or two pair of sun glasses and hand them to you?

A. I don't remember.

Q. In connection with this subject, that is to say, the sun glasses which you were asked to test by Exhibit 26, before receiving Exhibit 26 along with the one or two pair of sun glasses, had you discussed this matter with anyone in the land survival unit?

A. Before—

Q. Before you received Exhibit 26.

A. I might have. This happens often: Sometimes I would get a telephone call and say, "I have some goggles to test" and normally they have to come over with the goggles, and sometimes it is a telephone conversation and sometimes a person comes up and hands them to me.

Q. You say "might". I am asking you, do you recall having discussed the matter with anybody in the land survival unit before you received this R and R, dated 16 January, which is Plaintiff's Exhibit 26?

A. No, sir.

Q. Do you remember breaking, physically breaking a lens of a sun glass?

A. It was of a ski goggle.

Q. Ski goggle?

A. That is right.

Q. Did that breaking of a ski goggle take place in your office or in the land survival unit office?

A. Land survival unit office.

Q. And did that take place before the date of this R and R, Plaintiff's Exhibit 26?

A. No, sir.

Q. It took place after?

A. Yes, sir.

Q. So, am I correct in understanding that in addition to the sun glasses which were delivered to you, either personally by someone, or by messenger, along with Plaintiff's Exhibit 26, at some other time the land survival unit also delivered to you certain ski goggles for some tests?

A. Right.

Q. Did the delivery and request for tests of ski goggles come prior to or after the delivery and request for tests on sun glasses, requested by Exhibit 26?

A. It came afterward.

Q. About when?

A. Couple of weeks afterwards, some time like that.

Q. And did you ultimately submit those ski glasses to the Materials Lab. for similar technical tests?

A. Yes, sir.

Q. And receive back their report?

A. Yes, sir.

Q. And report in writing back to the land survival unit the results of the tests on the ski goggles?

A. Yes, sir.

Q. Now, when you received the ski goggles from land survival for test, did some written R and R accompany the samples then requesting a test?

A. I don't remember.

Q. Might it have been an oral thing, as well as R and R?

A. Yes, sir.

Q. Did you ever in your Lab. or elsewhere participate in a conference with Mr. Hollifield and/or Mr. Opper, and or with any other persons in relation to your testing of the ski goggle?

Mr. Aug: Your honor, we will object to the interrogation of this witness with respect to the ski goggle, because our direct examination of this witness has gone only to the testing of the other goggle.

The Court: I will sustain the objection. You may call him later on, if you wish.

Mr. Kelley: I am undertaking in cross-examination, your Honor, to determine whether or not this witness may not be confused as to the subject matter of a conference at which he was present when Mr. Opper was.

The Court: He probably will be, if we keep on. I will sustain the objection.

Mr. Kelley: May I state in the record my purpose?

The Court: I sustain the objection, Mr. Kelley. You may have your exceptions.

Q. Did you ever attend any conference, at any time or any place, with Mr. Opper present, other than the one as to which you testified to on direct examination?

A. Not to my knowledge.

Q. Could you say positively you did not?

A. Fairly sure; positively I did not.

Q. Now you say there was present at that conference on behalf of your Lab., that is the Vision Lab., of the Physiology Branch, yourself, and your immediate superior Mr. Strand. Anyone else from that branch or lab. at this conference?

A. They might have dropped in. They might have passed through. The door was always open. But not taking part in the conference as such.

Q. By "they" whom do you refer to?

A. Colonel Carlson or Dr. Heim himself.

Q. You are satisfield they did not remain and participate in the conference?

A. That is right.

Q. You say in addition to yourself and Mr. Strand there was Mr. Hollifield. Then you mentioned Mr. Murray. He was then a civilian. Mr. Murray is now in the Armed Forces.

A. That is right.

Q. What is his full name?

A. Norris Murray.

Q. What was his connection with the subject matter discussed, that is, the sun glasses to be used or submitted for use in the D-1 kit? What was Mr. Murray's connection with that project?

A. Actually at the time I didn't exactly know what his connection was. He didn't say much. I didn't know exactly what his connection was.

Q. You have learned since he was the project engineer in the D-1 kit?

A. Yes, sir.

Q. Mr. Hollifield was the project engineer on the E-1 kit, wasn't he?

A. I don't know.

Q. But you do know it was Mr. Murray who was project engineer on the D-1 kit which involved the sun glasses which was the subject of your conference?

A. Yes.

Q. What time of day did you commence that conference?

A. That was, I think it was in the morning.

Q. You think?

A. Yes.

Q. Might it have been in the afternoon?

A. Might have, but if I had to say, I would say it was in the morning.

Q. But you aren't sure?

A. No.

Q. You say a telephone call preceded their actual arrival at your office?

A. Yes, sir.

Q. And you were one party to that 'phone call?

A. Yes, sir.

Q. Can you swear under oath who the other party was, whether Mr. Hollifield or Murray?

A. Yes. I would say it was Mr. Hollifield.

Q. Had you been acquainted with Mr. Hollifield prior to that time?

A. Been introduced to him probably.

Q. That only?

A. I think that was the first actual lab. connection, I mean had to do with work.

Q. You had had no official transaction with him at all prior to that meeting in your office?

A. Well, as I say, he might have brought the goggles up originally.

Q. That is pure speculation, isn't it?

A. That is right. I am not sure.

Q. Had you had any official transaction with him at all prior to his telephoning you and meeting afterward, coming over to your lab. for a conference?

A. As far as I can remember, I couldn't answer; I couldn't say.

Q. How about Mr. Murray, had you had any official transaction with Mr. Murray prior to receiving a call from Mr. Hollifield, followed by their coming to your lab.?

A. You mean speaking to him or in a communication?

Q. Lieutenant, I said an official transaction.

A. Oh, we got one. The goggles came to us on an R and R. That was an official transaction.

Q. Had you any official transaction with Mr. Murray prior to this conference wherein you and he were physically together and discussed such a transaction?

A. Not to my knowledge.

Q. Had you ever seen Mr. William J. Opper before, as you say, he entered your office on the occasion of this conference concerning sun glasses?

A. Not to my knowledge.

Q. You say there was another gentleman who came along. Who was he?

A. I can't remember.

Q. Let's call him Mr. X. Describe Mr. X physically?

A. My impression of him was that he was sort of a small, slight man, blondish gray hair.

Q. You have been interrogated since the date of that conference by Special Agents of the F. B. I., have you not?

A. Yes, sir.

Q. On occasion those agents have brought you together with divers individuals and asked you whether or not you could identify such individuals as Mr. X, have they not?

A. Yes, sir.

Q. Who have they pointed out to you and asked you whether or not it was Mr. X?

A. Only one person.

Q. Who was that?

A. Mr. Buchsbaum.

Q. What did you say?

A. I said, no, to my knowledge it was not.

Q. Now tell this Court and jury all that you observed concerning the physical appearance of Mr. X?

A. I imagine if I saw him I might remember him. I am not even sure of that. But to go any further with a description would be just speculation.

Q. Any further? What have you said up to now?

A. As I said, he seemed to be—I remember he seemed to be light complected. That is about as far as I could go with it.

Q. About how tall was he?

A. Medium height. He wasn't outstanding to my mind or I probably would remember those things.

Q. What do you mean by medium height?

A. My height.

Q. How high are you?

A. Five, ten, probably.

Q. What would you judge his weight to have been?

A. Medium weight.

Q. Color of his hair?

A. As I said, he was sort of blond or gray. It was light, I judge.

Q. What do you call medium weight?

A. 160, 170.

Q. What would you judge his age to be from what you observed?

A. Middle age.

Q. What do you mean by middle age?

A. Between 35, 48, 50.

Q. Do you recall anything as to the wearing apparel he had on that day?

A. Nothing striking.

Q. Do you recall anything that Mr. X said during that conference?

A. No.

Q. Can you state anything Mr. Opper said during that conference?

A. No.

Q. Mr. Murray engaged in the discussion, did he not, as to why these goggles should be considered suitable for the kit, during that conference?

A. Might have said something. I can't remember exactly what he said. He didn't speak too much.

Q. He did participate, however, did he not?

A. Must have said a few things; everybody participated.

Q. Everybody did?
A. Yes.
Q. You mean yourself?
A. Yes.
Q. And Mr. Strand?
A. That is right.
Q. And Mr. Murray?
A. That is right.
Q. And Mr. Hollifield?
A. That is right.
Q. How long did that conference last, Lieutenant?
A. An hour or so.
Q. You mean by "so," an hour or slightly longer?
A. Yes, sir, that is right.
Q. Satisfield at any rate it was at least an hour?
A. That is right.
Q. You discussed this matter with your immediate superior, Mr. Strand, in the last several days?
A. The last several days?
Q. Yes.
A. What do you mean by "several days"?
Q. The last week?
A. Slightly. I mean not the conference particularly.
Q. Have you discussed with him anything concerning what occurred or who was present or what might have been said at that conference, in the last week?
A. Maybe. I am not sure if it was in the last week.
Q. Do you remember my interviewing you in a room across the hall? Since the time that I interviewed you, about how long was that?
A. That you interviewed me?
Q. Yes, across the hall.
A. About ten days ago, I guess.
Q. Within the last ten days have you discussed anything whatsoever concerning what occurred or may have been said at that conference with Mr. Strand?
A. Maybe we mentioned—it wasn't any long discussion. Probably mentioned it.

Q. Did you mention something about what may have happened or have been said by any one at that conference?

A. I don't believe we did.

Q. Did Mr. Strand inform you that I had also interviewed him in that room?

A. Yes, sir.

Q. Describe Mr. Murray who was present at that conference.

A. Tall, heavy-set gentleman.

Q. What would you judge his height to be?

A. About six, one.

Q. His weight?

A. 210, 220.

Q. Age?

A. 40.

Q. He was present during all of this conference, when you say Mr. X was there and Mr. Opper was also there?

A. That is right.

Q. Where is Mr. Murray today, if you know?

A. I understand he is in Germany.

Q. Where did you last see Mr. Murray?

A. Sometime this past winter.

Q. If Mr. Opper and Mr. X were there at the conference, Mr. Murray of necessity would have had to observe their presence, because he was there at all times; is that right? Can you fix the month when you saw him?

A. I would say about three months ago.

Q. Did he inform you he had been brought back to be interrogated in connection with the facts of this case?

A. Not as far as I know. .

Q. He had been in Germany theretofore?

A. I don't know.

Q. Now tell us everything that you can remember that Mr. Hollifield said at that conference?

A. Oh, as far as I remember, he gave the reasons for —gave his reasons that he thought we should grant a deviation and we discussed them. That was it. The reasons are in the R and R.

Q. I believe in direct examination, counsel for the government asked you concerning the work order that you sent over. Then he asked you if you received some communication back from Mr. Koch as to the results of his test.

A. Yes.

Q. I don't believe you were asked as to whether that information received back from Mr. Koch was oral or written. What was it?

A. What is the date? The first time I got a communication, it was oral. I got it over the telephone. I wrote down the figures.

Q. You sent the work order on the 17th?

A. That is right.

Q. Of January 1951. Now when was it you say you received some oral response from Mr. Koch?

A. Oh, either the 17th, 18th, 19th; sometime around there.

Q. And then you say you later received a written response?

A. That is right, a lab. report.

Q. Substantially to the same effect as the oral report?

A. Yes.

Q. Do you know where that written report is?

A. Right now?

Q. Yes.

A. Probably in my file folder.

Q. In your file folder?

Mr. Kelley: May I ask if the government has it?

Mr. Aug: Yes, sir, we do.

Mr. Kelley: Would you please produce it?

Mr. Aug: We certainly will. (Produces.)

Q. When Mr. Koch called you on the 'phone and orally told you the results of this test, what did he say?

A. Mr. Koch didn't call me.

Q. Who did?

A. Mr. Handmaker.

Q. What did Mr. Handmaker say?

A. He said the goggles don't meet the specifications and I said: "What are the figures?" and he gave me the figures.

Q. Figures about what?

A. Transmittance.

Q. Did you write them down?

A. Yes, sir.

Q. Have you any idea how long after that it was when the written report from Mr. Handmaker finally came through to you?

A. I know it is dated March 15th, the written report.

Q. You already had had an oral report from Mr. Handmaker, at the time you sat down in conference with Mr. Hollifield and Murray?

A. Yes, sir.

Q. Mr. Handmaker didn't consider their goggles suitable because of their light absorbing properties?

A. That is right.

Q. You didn't invite him to the conference?

A. No.

Q. It was your authority to pass for approval or not approve?

A. That is right.

Q. Mr. Handmaker was purely advisory to you?

A. He was doing the service.

Q. It was up to you whether they were suitable, you and your superior, Mr. Strand?

A. Well, yes, acceptable for the kit. In other words, we would say whether they met the specification. And there were other parts of the goggle we would be interested in, such as distortion and thickness, some facts given to us by Handmaker, and some we get ourselves, and we would say, "This doesn't meet the specifications for the following reasons." We evaluated the—

Q. You knew that the whole matter of inquiry was with respect to the suitability of this goggle for inclusion in the D-1 kit, didn't you?

A. That is right.

Q. You knew that the effect of your decision as to whether they were reasonably within the spec. or sufficiently close to the spec., was to determine their suitability for inclusion in the kit?

A. That is right.

Q. Many applications were made by contractors for some deviation in specification?

A. That is right.

Q. In the same way you would consider the price and cost?

A. That is right.

Q. And upon the price would make your determination as to whether they were suitable or close enough to the spec. to be suitable in the kit?

A. That is right.

Mr. Kelley: Would you please mark that as Defendant's Exhibit F for identification?

Thereupon a test report was marked for identification as Defendants' Exhibit F.

Q. I show you what has been marked for identification as Defendants' Exhibit F and ask whether you can identify it. Yes or no.

A. Yes.

Q. What is it?

A. That is the materials lab. test report, giving a report on the goggles that were tested.

Q. That is the written response to your work order which you sent down to Mr. Koch, and this response is prepared by Mr. Handmacher?

A. That is right.

Q. And what is its date?

A. 15 March 1951.

Q. However, before you ever received that, you and Mr. Strand, now Lieutenant Strand, had already reached a decision in the matter, had you not?

A. That is right.

Q. The decision being reflected in your R and R, Comment 4, which is Government's Exhibit 28-B. So, you reached your decision, acted upon it, communicated that decision back to the land survival unit before you ever did, or before the written report from Handmacher ever caught up with you?

A. Yes, sir.

Q. As far as you know, if you received and in turn transmitted to Mr. Koch two pairs of sun glasses, were they identical, as far as you could observe?

A. Probably.

Q. You are forced to speculate first as to whether there was one or two?

A. That is right.

Q. And you say if there were two, they were probably alike. Would you suggest any reason why you should send more than one?

A. No, I couldn't. Probably sent one. I can't think of any reason I would.

Q. Would you describe for the Court and jury what that pair of sun glasses looked to you?

A. Leather frame, folding goggles, with some perforations on the top, and there were glass set shields and plastic set shields, and plastic lenses. The lenses are set into the leather and there is an elastic head band that attached to the goggles.

Q. You had in your possession and used as a guide certain written specifications with respect to that sun goggle, did you not?

A. Yes.

Q. Do you recall the identity of that particular specification?

A. The number?

Q. Yes.

A. MIL-G-4085.

Q. And it was with reference to that specification that after having received an oral report from Mr. Handmacher that you reported back that the goggles submitted

to you did not fully meet the specification which you just recited?

A. That is right.

Q. Was there anything in the specification concerning color?

A. It says the color should be neutral.

Q. What does neutral color mean to you?

A. It is a gray, probably best described—In other words, we take a piece of plain glass and keep making it darker and darker.

Q. With pigment of some kind?

A. Yes.

Q. So there is some color?

A. Well, gray isn't a color.

Q. What do you use to get gray into a glass?

A. Black.

Q. So it is some mixture of black and that is not a color, is it?

A. No, black is not a color.

Q. Are you prepared to say that no color in any form was impregnated into the sun glass?

A. No, I am not.

Q. By that do you mean that there might have been, as far as you know?

A. Well, we use a chromoticity system which defines the limits. We say absolutely no color is a certain point, but there were certain manufacturing difficulties. So we draw a circle around that. We say anywhere within that point is gray and that is our neutral.

Q. If a most accurate laboratory analysis were to demonstrate that some colored pigment was in the goggle, it would not remove it from the spec.?

A. We do not measure pigment.

Q. If some degree of color were present in the glass submitted, it would not for that reason then be without the specification?

A. As long as it falls witnin the circle.

Q. Within this tolerance?

A. That is right.

Q. Is the chromoticity in any sense synonymous with color?

A. That is right.

Q. Chromo means color?

A. Chromo.

Q. Was the color of this goggle or chromoticity a matter or subject of discussion at that conference?

A. Oh, yes.

Q. It was one of the principal ones, wasn't it?

A. That is right.

Q. What did you have to say about that aspect of the matter?

A. Well, I thought that neutral was the best since you don't get any color distortion when you look through a neutral lens. We thought about possible survival situations where you might be in a—everything would look green in a jungle and you would have a problem. It might be better to have the neutral. It was discussed; it was thought about and talked about.

Q. The question would depend much on how green.

A. Actually we just considered it green. I don't think we considered how green it was.

Q. You knew what kit this goggle was to be a component part of?

A. It was probably explained at the time.

Q. The D-1 kit. Was it explained to you it was to be used in arctic and very cold regions?

A. Probably so. I can't remember that part of it. I imagine it would have come up, if we discussed this goggle.

Q. Tell this Court and jury everything you do remember that anybody said at that conference?

A. Exact words I couldn't tell you.

Q. Give us the substance. Tell us everything you remember.

A. The reasons were presented to us as outlined in the R and R.

Q. By whom? Who is doing the speaking?

A. Mr. Hollifield presented these reasons.

Q. Exclusively Mr. Hollifield?

A. I would say practically exclusively.

Q. What do you mean by "practically exclusively"?

A. Somebody else might have said something.

Q. You want it to be your testimony that Mr. Murray only might have said something. Don't you know he did?

A. No.

Q. You suggest he may have been speechless for more than an hour?

A. No. He said a few things. It is my impression of the conference Mr. Hollifield did most of the talking.

Q. I didn't ask you for your impression. I asked for your memory. Can you state now that you can't remember anything that Mr. Murray said?

A. Specific?

Q. Yes.

A. Yes, I can state that. I can't now remember anything he said.

Q. Can you remember anything specific that you said?

A. I can, not specific, not word for word.

Q. Or in substance?

A. In substance, yes.

Q. What can you remember in substance that Mr. Murray said?

The Court: What did you say in substance? Go ahead.

A. This was about the green in the neutral. We discussed that it was my impression it should be considered that the—we are using green lenses. The person might be at a disadvantage due to the color distortion.

Q. In what part—

The Court: Finish what you said in substance.

The Witness: And then maybe Mr.—probably Mr. Strand discussed that and said maybe. Then the problem of what type of kit it was might have come up.

The Court: They want to know what you said in substance. Is that all you recall that you said in substance?

The Witness: Yes. That is all I recall in substance.

Mr. Kelley: Your Honor finished?

The Court: Yes. I only want the witness to answer the questions. You asked him what he said in substance.

Mr. Kelley: I would have come to it.

The Court: I think the time to come to it is now while we are on the subject.

Q. Witness, have you told us everything that you can recall that you said in substance at that conference?

Mr. Aug: He said he had.

Mr. Kelley: That is his Honor's examination. I will conduct mine.

A. Yes, sir.

Q. And your observations or remarks on that occasion were as to the color green?

A. Probably said something about transmission, too. I don't remember in substance what I said.

Q. When you made some observation about the color green maybe affecting the clarity of what the wearer might see, were you envisioning its use in the tropics or in the arctic?

A. At the time I don't remember what I was envisioning.

Q. You must have envisioned something.

A. In all climates, all areas, probably.

Q. You have no recollection that you mentioned anything about the arctic?

A. No specific recollection.

Q. Are you an optometrist?

A. Yes.

Q. Is Mr. Strand?

A. No. He is a physicist.

Q. Are you the only optometrist in the Vision Lab.?

A. Not now.

Q. Were you the only optometrist there then?

A. Yes, sir.

Q. Did you ever make a statement to a special agent of the FBI, while being interrogated about this matter, that you, being an optometrist would, yourself, personally rather use the goggle that Opper supplied in extremely cold conditions?

A. Yes.

Q. You made that statement?

A. Just a second. What goggle you talking about?

Q. I asked you whether at any time you ever made a statement—

Mr. Kelley: Can you read it? We will have it read for you.

(Thereupon the last Q. at the bottom of p. 503 and top of p. 504 was read by the reporter.)

A. I don't understand that. I don't see—I don't know exactly what goggle you are talking about.

Q. I don't care what goggle we are talking about. Did you ever make a statement to an agent of the FBI to the effect and in substance that you would rather personally use the goggle that Opper supplied in extremely cold conditions? You can answer that whether you did or not.

A. Not that I can remember at all.

Q. You did have conversations with FBI agents concerning that conference, didn't you?

A. Yes.

Q. They asked you what you said, didn't they?

A. That is specifically, is that? I just gave them a general idea.

Q. You would say then you didn't make such a statement?

A. I don't remember. I might have. I can't understand why I would say it.

Q. I will restate the question. Did you at any time

make a statement to an FBI agent that you would personally rather use the goggle that Opper supplied in extremely cold conditions?

A. No explanation?

Q. That is all.

A. I can't remember.

Q. Would you say you didn't ever make such a statement?

A. No, I wouldn't say that. I don't remember.

Q. You might have?

A. I might have.

Mr. Kelley: Your Honor, may we have a five-minute recess? I have to guard my voice a little bit from hoarseness.

The Court: Recess for about five minutes.

Thereupon a short recess was had.

The Court: Counsel may proceed.

Q. You were a project engineer in the Aviation Laboratory?

A. Vision unit.

Q. Vision unit of the Physiology branch. As such were you not required to keep a project file?

A. That is right.

Q. And that was kept personally by you?

A. Yes.

Q. It represented the accumulation of all progress on that project insofar as you had anything to do with it?

A. Yes.

Q. Where is that project file that relates to this matter, which I think you said was described as Goggles and Sun Glasses? That was your project, wasn't it?

A. That is right.

Q. Where is that file?

A. File is at the lab.

Q. Now, wasn't it your custom whenever anything developed in connection with your project, Goggles and Sun

Glasses, to make notes to retain in that project file, which would show what had been accomplished?

A. It should have been, but we were kind of careless about these project file folders at that time. We have since been more diligent.

Q. Since when?

A. Since the director came out last year.

Q. Didn't you keep any notes up to the time of this conference?

A. Absolute notes?

Q. Yes.

A. No. I was new at the time.

Q. How new were you at the time of that conference?

A. I was there from November 28th. I was there about a month or so, month and a half, two months.

Q. Incidentally, how close can you fix the exact date of the conference?

A. Within a week to ten days after the original communication, after we got the goggle, around the 23rd, 24th, 22nd.

Q. You had an opportunity outside of this court room to examine all of these exhibits, have you not, Government's Exhibits 27, 25, 26, 28-A and 28-B? You have examined those several times in the recent weeks, have you not?

A. Yes, sir.

Q. Isn't there anything in those documents that serves to refresh your recollection as to the exact date of this conference?

A. Well, this R and R was written on the 25th.

Q. You were referring to Government's Exhibit 28-A and 28-B. Is there anything on that that serves now to refresh your recollection, as to the exact date when this conference was held in your office?

A. It still wouldn't, couldn't give you the exact date. I would say within two days. I say the 22nd, 23rd, 24th, 25th.

Q. This instrument, Government's Exhibit 28-A is dated 25 January 1951.

A. Yes.

Q. And at least that serves to refresh you that the conference was before or after that date?

A. The conference was before that date.

Q. Why do you say that. Is there something there?

A. "Confirming conversation between."

Q. The very first sentence here: "1. Confirming conversation between Messrs. F. Moss and O. Strand of your branch, and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated" and so forth. Is that the conversation mentioned here—Was that the conference as to which you have been testifying?

A. Yes, sir.

Q. And it states as I just read—mentioned: Mr. Moss, Mr. Strand of your branch, Mr. Hollifield and Mr. Murray of the Medical Specialties Branch?

A. Yes, sir.

Q. Doesn't mention Mr. Opper or Mr. X, does it?

A. No.

Q. So then you would say in fixing the date of that conference, it had to be after the date of your work order?

A. Yes.

Q. Which was the 17th?

A. That is right.

Q. And it had to be prior to the date of Government's Exhibit 28-A, which was January 25th. Correct?

A. That is right.

Q. Now, when you reached the end of that conference, toward the end, I believe you testified on direct examination, that something was said that Mr. Hollifield should prepare something and send it to you?

A. That is right.

Q. Tell us again what was said in that respect and by whom?

A. Mr. Strand suggested that Hollifield prepare an R and R giving the reasons and that we would answer it.

Q. That is to say, to put in writing the very reasons he had given orally?

A. That is right.

Q. Ask you to think carefully about this: Isn't it a fact that while you were still in that conference that you and Mr. Strand verbally stated that the reasons suggested for the deviation were sufficient to satisfy you of their propriety and that you did, as of then, state it to be your decision that they would be acceptable?

A. I think so.

Q. Are you in doubt about it?

A. Well, yes, I am pretty sure. I am not sure. In the end Strand might have said: "We will think about it some more." I am not sure. My impression was, we agreed to it.

Q. That you had orally stated that the reasons were sufficient in your minds to warrant the deviation on its merits?

A. That is my impression of it.

Q. What were those reasons that led you to change your mind and to conclude finally that on the merits the deviation was proper and justified?

A. The two main ones were the kits were needed very badly and not having the goggles would hold up the kits, and too, the government would save a substantial amount of money.

Q. Wasn't there another reason that tended to establish for you that on the merits the deviation ought to be allowed?

A. One of the other reasons was that we had not gotten any unsatisfactory reports.

Q. Exactly. It was represented to you that some 15,000 D-1 kits which the government itself had packaged, using government furnished goggles, had been sent to the field and used by troops in the field without one complaint ever coming back. Wasn't that represented?

A. Yes.

Q. Wasn't that an element which led you to believe that on the merits the deviation was justified and warranted in the interests of the government?

A. That was the third reason, in the order given,

exigency, in other words, speed; saving of the government's money and there were no unsatisfactory reports.

Q. All three of those reasons at least led you to conclude that on the merits of the question, the best interests of the government would be served by approving that deviation and the use of those goggles in the kit?

A. That is right.

Q. Now, sir, as of today and any time between the date of that conference and today, has any information or knowledge come to you at all that would lead you now to state that the representation that the goggles were urgently needed was a false representation?

A. No.

Q. Have you received any information to this very moment that the representation made to you that the government would save money, some $38,000, was a false representation?

A. No.

Q. Or, have you to this moment received any information from any source that the fact that the government itself, using government furnished materials, packaged 15,000 of these goggles in kits, sent them to the field and they were used without one complaint? Have you any reason to believe that representation was false?

A. No.

Q. Did you observe anything about the conduct of Mr. Hollifield during that conference and the entire time that appeared to you to express any impropriety in his conduct in making such representation?

A. No.

Q. You recall when you and I discussed this matter some ten days ago, telling me that at the time of this conference you had no idea who the contractors were with respect to the making of these D-1 kits?

A. That is right.

Q. And you didn't knew it then?

A. No.

Mr. Kelley: Your Honor will, of course, recall that earlier in my cross-examination I approached the subject

of ski goggles; objection was made and the Court sustained it, that that was a matter not gone into on direct examination and, therefore, not proper for cross-examination. I am mindful of the saving of some time and I would, while this witness was on the stand, have him merely identify a document which does relate on its face to the ski goggle and to his deviation.

The Court: He may do that.

Mr. Kelley: I ask the government to produce for me the original of the R and R dated February 6, 1951, Subject: Goggles, Ski for survival kit. To MCREXD-7. From MCREXD-8. Attention Mr. R. G. Hollifield. Signed—

The Court: Have it marked Defendants' Exhibit G for identification.

Thereupon said R and R was marked for identification as Defendants' Exhibit G.

Q. Lieutenant, I show you what has been marked for identification Defendants' Exhibit G and ask whether or not you can identify it?

A. It is my signature.

Q. Can you identify it?

A. Yes, sir.

Q. What is it?

A. It is an R and R from me to Mr. Hollifield, stating that—

Mr. Aug: I don't want any substance of that exhibit.

The Court: Sustained.

Q. To what subject matter does it relate?

The Court: I will sustain the objection. Your request was that you be permitted to have that identified. It is identified and marked as an exhibit. You may later on call this witness, as you know, and put him on the stand any time you please, when you come to the defendants' side of the case, but we are not going to do indirectly what I have already ruled on.

Mr. Kelley: My whole purpose is to save time.

The Court: Well, we have taken so much time now, we won't try to save a minute or two.

Q. Having reference to Defendants' Exhibit G, are you aware of another R and R preceding or following this and relating to the same subject matter?

Mr. Aug: Now, your Honor,—

Mr. Kelley: All right. We will call the witness later.

Mr. Aug: We may be interested in saving time, but we are also interested in—

Mr. Kelley: Do you propose to remain in the jurisdiction of this Court for the next few weeks?

The Witness: I plan to go to Columbus on Tuesday.

The Court: As far as you know you are not under orders to go any place else at present?

The Witness: No.

Mr. Kelley: The only thing is, if the Court please, I certainly and should respectfully bow to the Court's ruling, but I would not want to do it at my peril.

The Witness: I will be within the jurisdiction.

The Court: Well, as far as we know, he expects to be here.

Mr. Kelley: I don't want to chance it.

The Court: They are under military orders.

Mr. Kelley: I don't want to suffer as a result after he is here today.

The Court: I can't tell if the Commander in Chief, Mr. Truman, orders this young man to go to Korea.

Mr. Kelley: If there is any likelihood of that, I think the Court should permit me to find out, if I wish.

The Court: You take it up with Mr. Truman and find out.

Mr. Kelley: I don't know whether I can find him home on the Potomac.

The Court: I suppose that will be a top secret. Anyhow, he will be back, as far as we know; he expects to be.

Mr. Aug: Your Honor, I have a few questions of the witness.

Redirect Examination, by Mr. Aug.

Q. Lieutenant Moss, this conference to which we have referred, you were present, Mr. Opper was present, Mr. Hollifield was present. Now these reasons were stated by Mr. Kelley on cross-examination as the reasons which were advanced to you, which became the reasons upon which you changed your rejection of the goggle: One was exigency and speed, and two was the saving of money, and three was that the government had used them before. Now those reasons were advanced to you by Mr. Hollifield, were they not?

A. Yes, sir.

Mr. Kelley: I object to that. That is not quite my question. I said used by the government and no unsatisfactory results from the field.

Mr. Aug: Very well.

Q. Used by the government and no unsatisfactory results from the field. Those reasons were advanced to you by Mr. Hollifield?

A. That is right.

Q. And the purpose of this meeting was to discuss the changing of your mind from a rejection which you had previously made; is that correct?

A. Yes.

Q. We have talked about the color requirements of the specifications. Did or did not the goggles meet the specifications with respect to color requirements?

A. They did not.

Q. We have talked about light transmission of the goggle. Did or did not the goggle meet the specifications with respect to light transmission?

A. They did not.

Q. And on the basis of those two reasons you rejected the goggle; is that correct?

A. That is correct.

Q. And this was a ski goggle?

A. No.

Q. It was a sun goggle?

A. Yes, sir.

Mr. Aug: Very well. Through with the witness, your Honor.

Recross-Examination, by Mr. Kelley.

Q. I have some recross in view of this. Didn't you say, Witness, that those three reasons which I enumerated and which were again enumerated by counsel for the government were among the reasons tending to develop your ultimate decision?

A. I might have said it. There was one other one.

Q. But those three reasons and one other were sufficient to convince you that on the merits of those reasons alone the government's best interest called for approving the deviation. Right?

A. That is right.

Q. Now your decision and your opinion on many other occasions had been called upon to consider and either approve or reject deviations, as to other components and other matters, had it not?

A. That is right.

Q. And in this case, just as you did here, you heard the pros and cons and made up your mind upon the basis of those merits and those reasons alone?

A. Yes.

Q. You were not guided by any influence, because of the presence of Mr. Hollifield, were you, or his persuasive tongue?

A. No.

Q. You thought of the reasons themselves, didn't you?

A. Yes, sir.

Q. And you knew at the time that the D-1 kit was Mr. Murray's project, didn't you?

A. No.

Q. Well, on the R and R that you received, after your conference, which set up seriatim these reasons for approval, who signed it?

A. Mr. Murray's signature.

Q. Mr. Hollifield's signature isn't there, is it?

A. No, his signature is not there.

Q. There the initials appear that say "RGH", aren't there?

A. That is right.

Q. But his signature isn't there?

A. No.

Q. Are you familiar with the custom at the Field that the person who initiates, that is to say, writes out in longhand an R and R and hands it to the stenographer, that normally she will put the initials of the man whose handwriting she thinks it is on the sheet?

A. Yes, sir.

Q. And those are the initials of who she thinks wrote out the R and R, will go to the right over his initials?

A. Yes.

Q. Now, is it not also the custom that after receiving in longhand the substance of an R and R, which the girl will type up, putting the initials at the right of the man whose handwriting she thinks it is,—does it not then go to the man whose initials are there first as the initiator?

A. Yes.

Q. Isn't it your custom that the man who initiated it should sign his name first under the word "concurrence"?

A. Yes, sir.

Q. And after that anyone concurring will sign. While the initials RGH appear here nevertheless the only signature under concurrence is Norris Murray, isn't it?

A. Yes, sir.

Q. And he was the only project engineer on the D-1 kit?

A. Yes.

Mr. Kelley: That is all.

Re-Redirect Examination, by Mr. Aug.

Q. Lieutenant Moss, talking about custom at the Field, with respect to this Routing and Record sheet, if the man who originated the memorandum were not there, in your experience has it been your experience that Routing and Record sheets would be formalized and the person who was responsible for the memorandum not have his signature on it?

A. Yes, it happen

Mr. Aug: That is all.

Re-Recross-Examination, by Mr. Kelley.

Q. Lieutenant Moss, having in mind this exhibit, Government's 28, we have two known factors, the initials RGH which correspond to those of Mr. Hollifield appear in the right margin. The pen and ink signature beneath "Concurrence" is that of Mr. Murray only. Thus, do I understand your testimony to be that two things could have brought this about, that Mr. RGH, Hollifield did initiate it, but he wasn't there to sign it and therefore Murray signed it in his place. That is one possibility. Right?

A. Yes.

Q. The other possibility is, is it not, that the person who did write this out in longhand and hand it to the stenographer, that she mistook his handwriting for RGH and therefore put down the initials RGH. But when it was transmitted to RGH, he not having initiated it, passed it on to the man who had and then the man who did initiate it, Murray, signed it? That is another possibility, isn't it?

A. Yes, sir.

Q. And the only man who can tell us the truth about that is Mr. Murray, isn't he?

A. Yes, sir.

Re-Re-Redirect Examination, by Mr. Aug.

Q. Pursuing this other possibility, if the latter were the case, would it not then be also a possibility that Murray would have corrected the RGH to indicate that Murray was the man responsible for the memorandum?

A. Yes.

Q. And let me ask you one other question. At the conclusion of your conference, at which Opper and Hollifield and Strand—

A. And myself.

Q. —and yourself and this other gentleman were present, you have stated that the conclusion then was for a routing and record sheet to be sent to you setting forth the reasons advanced as the basis of your changing your rejection at the conclusion of that conference. Who was the man who was to prepare that routing and record sheet?

A. It was my impression it was Mr. Hollifield.

Mr. Aug: No further questions.

Re-Re-Recross-Examination, by Mr. Kelley.

Q. You say that was your impression?

A. Yes.

Q. Now counsel on re-redirect has suggested to you the possibility that had Mr. Murray negotiated this document 28-A and had the stenographer mistakenly identified his handwriting to be that of Mr. Hollifield and therefore put RGH's initials, and had it then gone to Mr. Hollifield, who did not initiate it and he passed it to Mr. Murray who had, the possibility was that Mr. Murray would have had the stenographer correct the RGH. Is it not also a possibility that the matter would appear too trivial to bring back to an overworked stenographer to have her correct it?

A. Yes, it is possible.

Q. Have you ever known of such a thing happening in your unit such as this?

A. It happened to me.

Q. Did you take the trouble of going back to the stenographer and having it retyped?

A. Yes.

Q. Do you know of other instances where this has occurred and they didn't take that trouble and she was snowed under? You wouldn't know that.

A. No.

Mr. Kelley: We are through with the witness.

The Court: Counsel through?

Mr. Aug: We will call Mr. Marshall.

And thereupon

HUBERT MARSHALL, being first duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. Mr. Marshall, state your name for the record.

A. Hubert Marshall.

Q. Spell your last name.

A. M-a-r-s-h-a-l-l (spells).

Q. And your employment?

A. I am the District Commercial Manager for the Ohio Bell Telephone Company in Dayton.

Q. You live in Dayton, do you?

A. I live in Knollwood, which is on the outskirts of Dayton.

Q. In your capacity you have access to the long distance records of your company, do you?

A. I do.

Q. The long distance telephone calls?

A. I do.

Testimony of Hubert Marshall

Q. Have you had occasion to examine them recently with respect to telephone calls that would have been placed by Mr. Hollifield?

A. I have.

Q. And with respect to calls made from Mr. Hollifield's phone to a party by the name of Opper?

A. I have, yes.

Q. Can you produce those records for us, please?

A. (Witness produces records.)

Q. I will ask you if you have in your possession, Mr. Marshall, a record of a long distance telephone call made from No. Randolph 1849, person to person, to Mr. Opper, in Chicago, on April 13, 1951?

A. I do.

Q. Can you state to the jury what that record shows?

A. The record indicates that the call was placed—

Mr. Kelley: Just a moment. It is not in evidence; has not been offered in evidence. He is reading the substance of an exhibit that has never been offered.

Mr. Aug: May I have the exhibit marked for identification Government's Exhibit 46?

The Court: What is the date?

Mr. Aug: April 13th.

The Court: What year?

Mr. Aug: 1951.

Thereupon said record of long distance telephone call was marked for identification as Plaintiff's Exhibit No. 46.

Q. Now I will hand you Government's Exhibit marked for identification No. 46, Mr. Marshall, and ask you to state what that is.

A. This is a record of a long distance call which is made by the telephone operator as she takes and handles the call.

Q. Now what is the telephone number from which that call was made?

A. Randolph 1849 in Dayton.

Q. Does the record indicate to whom it was made?

A. The record indicates that the party requested to speak with William Opper in Chicago.

Mr. Aug: Mark this 47.

Thereupon said record of long distance telephone call was marked for identification as Plaintiff's Exhibit No. 47.

Q. I will hand you Government's Exhibit marked No. 47 for identification and ask you to identify that. Did you state what the date was on this instrument?

A. April 13, 1951.

Q. Then Government's Exhibit No. 47, I will ask you to identify that instrument, marked for identification.

A. This instrument is dated July 31, 1951. It is similar in nature to the first one: Record of long distance call taken by the operator from Randolph 1849 in Dayton, the party requesting to speak to William Opper in Chicago.

Q. I will hand you Government's Exhibit marked No. 48 for identification and ask you to state what that instrument is?

A. This is a record of service for Robert Hollifield. It indicates that Robert Hollifield was at the time responsible for Randolph 1849 in Dayton.

Q. It was his telephone number?

A. His telephone number, that is correct.

Mr. Aug: We would like to offer into evidence Government's Exhibits marked for identification 46, 47 and 48.

The Court: Very well. They may be admitted in evidence marked as Government's Exhibits 46, 47 and 48 in evidence.

Thereupon said records were admitted into evidence and marked as Plaintiff's Exhibits Nos. 46, 47 and 48, respectively.

Mr. Aug: That is all of the witness, your Honor.

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TRANSCRIPT OF RECORD

(Pages 417 to 775)

Supreme Court of the United States

OCTOBER TERM, 1954

No. 49

WILLIAM J. OPPER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1954

CERTIORARI GRANTED JUNE 7, 1954

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Cross-Examination, by Mr. Kelley.

Q. Did you produce these documents by virtue of subpoena duces tecum?

A. I did, sir.

Q. Do you have the subpoena?

A. I returned the subpoena to the source whence it came, when I brought the records over originally.

Q. What was the source from which it came, the marshal?

A. My recollection is it came from the office of the District Attorney.

Q. In undertaking to respond to the subpoena duces tecum which you received, did you segregate records of all long distance calls made from the number Randolph 1849, to Chicago, Illinois?

A. I segregated all of the calls on the dates in question.

Q. Only on those two dates. Now where did you keep and preserve those records that you have produced here?

A. Those records are kept and preserved in our files under regulation of Federal Communications Commission.

Q. And you have some records that would relate to any outgoing long distance calls from Randolph 1849 over how long a period of time prior to the date of Government's Exhibit 46, which is April 13, 1951?

A. I can't give you a direct answer to your question. We are required to keep them six months. In many cases we have them much longer than that. It is simply a mechanical process of destruction.

Q. When was this particular slip, Government's Exhibit 46 actually removed from your files?

A. It was removed for this purpose from my files about two weeks ago, I judge.

Q. Is that the first time it had been removed from your files for the purposes of this case?

A. That was the first time that it had been removed from our files for the purpose of the case, however, it had been removed before.

Q. For the purpose of examination and conveying its contents to the F. B. I.?

A. Yes.

Q. Would you say that you do have and have preserved slips covering other long distance calls from this number to Chicago, let's say for every month from January of 1951 on through and beyond April 13th, and including July of 1951?

A. As I say, it is our requirement that we keep these records for six months.

Q. But more than six months has gone by, hasn't it?

A. That is correct.

Q. But you saved these two. You don't know whether you saved the others.

A. I am not certain whether or not the others have been destroyed. At the present time my judgment would be that they have been.

Q. Do you make a record of the time and what you destroy?

A. We do.

Q. You could check your records again to determine the presence or absence of the records to which I have just referred?

A. I could.

Q. Mr. Marshall, I show you what has been marked for identification Defendants' Exhibit H and ask you whether or not you can identify it.

A. This is the—

Q. Can you identify it?

A. I can.

Q. What is it?

A. This is the subpoena which I received, requesting that I bring the exhibits which have just been presented to the District Attorney's office.

Mr. Kelley: That is all, your Honor.

Mr. Aug: No further questions.

The Court: That is all then, Mr. Marshall.

The Witness: Thank you.

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The Court: Now, Members of the Jury, it is a little after the adjournment time.

Mr. Kelley: Pardon me, your Honor. I beg to interrupt, but may I make a statement before this gentleman leaves?

The Court: Certainly.

Mr. Kelley: Will you resume the stand, please?

By Mr. Kelley:

Q. (After Mr. Marshall had resumed the witness stand:) In view of your testimony, Mr. Marshall, that you are authorized by the Federal Communications Commission to destroy records of the kind that you identified, after they are six months or more old, in view of the fact that we will desire to issue a subpoena to you, would you please see to it that such destruction is not carried out at least from this moment forward?

A. I will.

Mr. Aug: You mean until after the case is over.

The Court: Anything further?

Mr. Kelley: No.

The Court: Members of the Jury, we are about to recess the further hearing of this cause until 10 minutes after 2, giving you your full hour. During this interval, you bear in mind my usual admonition and return, if you please, at 10 after 2, this afternoon.

Adjourn court until 10 minutes after 2 this afternoon.

Thereupon the further proceedings in the trial of this cause were adjourned until 2:10 o'clock of the afternoon of the same day.

Testimony of Peter S. Lasho

Afternoon Session.

Thursday, May 22, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

And thereupon

PETER S. LASHO, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. Will you state your full name, so that the court stenographer can make a record of it, please?

A. My name is Peter S. Lasho, spelled L-a-s-h-o.

Q. By whom are you employed, Mr. Lasho?

A. Trans-World Airlines.

Q. Where do you reside?

A. Kansas City, Missouri.

Q. Do you work in Kansas City, Missouri?

A. Yes.

Q. Now what is your duty with the TWA?

A. I am a supervisor of tickets and statistics, which is a group, rather part of the revenue accounting section.

Q. In the performance of your duties, do you have the custody of certain flight records?

A. Yes, sir.

Q. And can you go to those records and determine that on such and such a day a certain person took a certain flight?

A. Yes, sir.

Q. I will ask you if you have had cause to examine these records and extracted therefrom the flight records of a flight taken by a man named Hollifield, from Dayton, Ohio, to Chicago, Illinois, on April 14, 1951?

A. Yes.

Q. Do you have that record with you, sir?

A. Yes. (Produces.)

Q. Do you also have in your possession a flight ticket for the return trip from Chicago to Dayton?

A. Yes, sir.

Q. May I see that, please?

A. (Witness produces ticket.)

Mr. Aug: Will you mark these for identification, please? This is Dayton to Chicago, 49.

Thereupon said ticket for trip from Dayton to Chicago was marked for identification as Plaintiff's Exhibit No. 49.

The Court: The return ticket then—

Mr. Aug: Would be No. 50, from Chicago to Dayton.

The Court: That would be Government's Exhibit No. 50 for identification.

Mr. Aug: That is correct, your Honor.

Thereupon said ticket for trip from Chicago to Dayton was marked for identification as Plaintiff's Exhibit No. 50.

Q. Mr. Lasho, I will hand you this instrument marked Plaintiff's Exhibit No. 49 for identification and ask you to state what that is.

A. This is a flight coupon which is a part of a ticket issued for transportation and it is good for transportation between Dayton and Chicago.

Q. Would you state what date is on it, please, sir?

A. The date of sale was April 13th, with reservations held on TWA flight 9, of April 14th, departing from Dayton, Ohio, at 7:45 a. m.

Q. And whose name is on that ticket, sir?

A. Mr. R. Hollifield.

Q. What is the year of the date which you stated?

A. 1951.

Q. Can you tell from the appearance of the ticket whether the ticket was used or not?

A. Yes, sir. The punches in the ticket indicate usage.

Q. What time was the time of departure?
A. 7:45 a. m.
Q. Time of arrival in Chicago?
A. Was 8:20 a. m., Central Standard Time.

Mr. Aug: Your Honor, we would like to offer in evidence Government's Exhibit, marked for identification as No. 49.

The Court: It may be admitted, marked as Government's Exhibit No. 49 in evidence.

Thereupon said ticket for flight from Dayton to Chicago was admitted into evidence and marked as Plaintiff's Exhibit No. 49.

Q. I will hand you Government's Exhibit No. 50 marked for identification, Mr. Lasho, and ask you to identify that, if you will.
A. This is flight coupon No. 2 which is a portion of the same ticket covered by coupon No. 1 mentioned in Exhibit No. 49. This coupon is good for transportation between Chicago and Dayton, Ohio.
Q. What is the date on the ticket, sir?
A. The date of the sale was April 13, 1951 with reservations held on TWA flight 548, April 14, 1951; departure time 7:05 p. m.
Q. Arrival time?
A. And arrival time on that particular flight was 8:40 p. m., Eastern Standard Time.
Q. And the person referred to as being the holder of that ticket—what is the name on that ticket?
A. Mr. R. Hollifield.
Q. Is there anything to indicate on that ticket that the ticket was used?
A. Yes, sir, punches in the ticket as they were in the previous coupon.

Mr. Aug: We would like to offer in evidence, if the Court please, Plaintiff's Exhibit No. 50.

Mr. Kelley: No objection.

The Court: It may be admitted as Plaintiff's Exhibit No. 50 in evidence.

Thereupon said ticket for flight from Chicago to Dayton was admitted into evidence and marked as Plaintiff's Exhibit No. 50.

Mr. Aug: We have no further questions.

Cross-Examination, by Mr. Kelley.

Q. You produced these tickets, Mr. Lasho, in response to a subpoena duces tecum?

A. Yes, sir.

Q. Do you have your subpoena?

A. Yes, sir. (Produces.)

Mr. Kelley: Mark this Defendants' Exhibit J. Let the record show the letter "I" was omitted, or was not used.

Thereupon said subpoena was marked for identification as Defendant's Exhibit J.

Q. Mr. Lasho, upon receipt of the subpoena, Defendants' Exhibit J for identification, you instigated a search of your records which would reflect the purchase of a ticket by R. Hollifield, being ticket No. 152A 776964 on flight 548 from Dayton, Ohio, to Chicago, Illinois, ticket being purchased on April 13, 1951, used on April 14, 1951, for round trip.

A. Yes, sir.

Q. Those are the records you produced?

A. Yes, sir.

Q. Did you search your records to determine whether in them you had any other tickets reflecting that R. Hollifield had made any other airplane trips in 1951 or 1950, from Dayton to Chicago, round trip?

A. No, sir.

Q. You have records covering that period, I take it?

A. We have records in our possession, at the present time, going back to the early part of 1951. I can't say the exact months.

Q. Approximately what month?

A. It would probably be January, or possible January has been destroyed now. It would be along in the spring months.

Q. You would not have retained any records that would show flights by an R. Hollifield prior to about January 1951?

A. That is right.

Q. They would have been destroyed?

A. Yes, sir.

Q. Those records are all in Kansas City?

A. Yes, sir.

Q. Would it necessitate your personally returning there to secure records of other flights, if there are such records, by an R. Hollifield, subsequent to January or February 1951?

A. If we had the records, it may be possible upon sending a message to our office, that they would review the records to determine that. However, that is a task.

Q. This was a task, was it?

A. This was not a task, sir, because the flight was enumerated right on the subpoena.

Q. But task or no, your records are there and could be examined?

A. That is right.

Q. And you would be the proper party to show a subpoena, requiring such a search and production, would be properly directed?

A. That has been the practice of the company, yes, sir.

Q. Mr. Lasho, when you leave the witness stand would you be kind enough to wait in the corridor for a couple of minutes until counsel can serve a subpoena upon you?

A. Yes, sir.

Mr. Kelley: That is all.

The Court: That is all.

And thereupon

JOSEPH THEODORE BENBEN, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. Would you state your name?

A. Joseph Theodore Benben.

Q. How do you spell the last name?

A. B-e-n-b-e-n (spells).

Q. Mr. Benben, where do you live?

A. I live at Chicago, Illinois.

Q. And where are you employed?

A. At the National Boulevard Bank.

Q. I will call your attention to April 16, 1951. Were you employed at the bank at that time?

A. Yes, sir.

Q. In what capacity?

A. As a receiving and paying teller.

Q. Do you know Mr. William J. Opper?

A. Yes, sir, I do.

Q. Do you see Mr. Opper in this court room?

A. Yes, sir.

Q. Will you step down from the stand, sir, and place your hand on the shoulder of the man known to you as William J. Opper?

A. The gentleman here. (Places hand on shoulder of William J. Opper.)

Q. Have you seen Mr. Opper at your bank?

A. Yes, sir.

Q. I will call your attention to April 16, 1951. Did you see him on that date?

A. Yes, sir.

Q. Do you recall the circumstances of that time that you saw him?

A. Yes, sir.

Q. Will you tell the jury what those circumstances were?

A. Mr. Opper came up to my cage and requested that I cash a check for him.

Q. Do you recall the sum of the check?

A. Yes, sir.

Q. What was that sum?

A. $1000.

Q. Did you cash it for him, sir?

A. Yes, sir.

Q. I will hand you Government's Exhibit No. 42, which is in evidence, and it is a photostatic copy of a check. I will ask you to look at that check, sir.

A. (Witness does as requested by counsel.)

Q. Have you ever seen that check before?

A. Yes, sir, I have.

Q. And can you describe it?

A. Yes, sir. This is the check that I cashed in the amount of $1000, made payable to cash, dated April 13th and cashed April 16th.

Q. Is there anything on the back of that instrument which indicates to you that you were the person who handled that check?

A. Yes, sir. My three initials are under the endorsement stamp.

Q. What is the date stamped on the back of the check?

A. April 17, 1951.

Q. You cashed it the 16th?

A. Yes, sir.

Q. Is there any explanation as to why the check is dated the 16th and stamped the 17th?

A. It is a law of the Chicago Clearing House. Any banks clears its checks through that organization must have the date of the following day in their stamp. Take for instance, this check was cashed on the 16th but the date is the 17th, which is the date when all the banks take their checks to the clearing house and exchange them for their own checks. So all the checks we cashed on the 16th, on the following morning, the 17th, we take them down to this one central building and exchange them. Therefore we have to have our stamp of the 17th in there.

Q. Did you put that stamp on the back of that check?

A. Yes, sir.
Q. What date did you put that on there?
A. 17th.
Q. What date did you put the stamp on?
A. Oh, the 16th, sir.

Mr. Aug: No further questions.

Cross-Examination, by Mr. Kelley.

Q. Mr. Benben, I take it that before you took the witness stand, counsel for the government, at one time or another, have shown you this photostat and asked you questions about it?

A. Yes, sir.

Q. Was it the fact that you had seen this photostat, Government's Exhibit 42, and the fact that it refreshed your recollection that permitted you to say that you remember cashing the check on the 17th for Mr. Opper? Was there something about that occasion that stands out in your mind over and above all others of like character?

A. It was a part which refreshed it, but not altogether. When I cashed this check here it was for $1000. Normally in our bank that would be a large transaction and it would need the O. K. of an officer, but in this case it didn't because I knew Mr. Opper and at that time he showed me a duplicate credit from one of our other banks showing he left a large amount credited to his account and, therefore, I had no cause to have this item O. K.'d by an officer; I just went and cashed it.

Q. You have handled Mr. Opper's business as a teller for quite a long while, haven't you?

A. Yes, sir.

Q. About how long to your own knowledge has he had an account there?

A. I couldn't say how long Mr. Opper has his account there, but I started in this particular bank, in this particular department about a year and a half ago.

Q. And this was not the first time that Mr. Opper had

presented a check in that large an amount to you for cashing, was it?

A. No, sir.

Q. There were other occasions when he would present checks for that amount or larger, were there not?

A. I couldn't say whether they were larger, but they might have been, yes, sir.

Q. I show you, Mr. Benben, what has been received in evidence I believe Plaintiff's Exhibit 43 and that has been identified as a photostatic copy of the ledger sheets on Mr. William J. Opper's account with your bank commencing with a period January 2, 1951 through to September 27, 1951. Calling your attention to the first page of this exhibit does there appear to be any checks drawn by Mr. Opper in the amount of $1000 or more cleared through this account?

Mr. Aug: We will object to this line of testimony. It goes beyond the direct examination.

The Court: I will sustain the objection. It is the same thing we had the other day. The document is in evidence.

Mr. Kelley: The same check we had the other day and that is already in evidence, too, your Honor, but they brought the witness here.

The Court: Beg pardon?

Mr. Kelley: It is the same check also that was in evidence the other day and yet the government was permitted to interrogate this witness about it.

The Court: Why certainly. The government called him to show that Mr. Opper, so they claim, cashed the check personally. Now this is an account that is here. It is in evidence. You want him to count up the number of checks Mr. Opper has signed. That is not necessary. The jury can count them; you can count them; anybody can count them. It is there in evidence. If I had marked that for identification, I would say, yes, you were right, but it is

already in evidence. He can't add anything to it. If he says there are 20 checks in there, it turned out to be 25, doesn't change the record any.

Mr. Kelley: I must have been misled, your Honor. This check also was in evidence. Nothing he can say about it would add anything, as well.

The Court: I didn't hear any objection to the testimony. I don't think there could have been one made anyhow, as far as that is concerned, but I still say that is in evidence; it speaks for itself. No use to keep asking this witness all the time to count up what is on there. You can argue to the jury. You can count it now, if you wish to. I won't object.

Mr. Kelley: We discussed yesterday this is no time for the defense to put in a case. I have no right to put in any evidence at this time.

Mr. Aug: It is in evidence.

Mr. Kelley: So I understood the checks were in evidence.

The Court: It is all immaterial at this time. It is in evidence. It is there, Members of the Jury. That is a record you can see it for yourself. He doesn't have to sit here or some other witness and tell us what is on there. It is already in evidence in the case.

Mr. Aug: Through with the witness?

Mr. Kelley: I said I was through, yes.

Mr. Aug: No further questions.

The Court: That is all.

And thereupon

EUGENE W. MARSHALL, being duly sworn, testified as follows:

Direct Examination, by Mr. Aug.

Q. Will you state your full name?

A. Eugene W. Marshall.

Q. Where are you employed?

A. I am employed in the Payroll Section, Personnel Office, Wright-Patterson Air Force Base.

Q. Do you live in the Dayton area?

A. I live in Xenia, Ohio.

Q. Now in your capacity out at the Field, do you have custody of the payroll and leave records of the employees at Wright Field?

A. That is correct.

Q. Now, have you in your possession the payroll and leave records of Mr. Robert Hollifield for the early months of the year 1951?

A. I have them.

Q. Will you produce them, sir?

A. (Witness produces records.)

Q. What period of time does that leave record cover?

A. Entire year 1951.

Mr. Aug: Mark this for identification, please, 51.

The Court: No. 51 for identification.

Thereupon said leave record was marked for identification as Plaintiff's Exhibit No. 51.

Q. Mr. Marshall, I will hand you the document marked as Plaintiff's Exhibit No. 51 for identification and ask you to state what it is.

A. It is his official leave record, of Robert G. Hollifield, for the year 1951.

Q. Can you look at that record, sir, and state whether or not Robert G. Hollifield was on a leave status from the

Field between the periods of August 5th to August 18, 1951, inclusive?

Mr. Kelley: Just a moment. In the interests of orderliness, I submit that if he is going to read from its substance, it ought to be offered in evidence. It hasn't been.

Mr. Aug: No, it hasn't. We will offer it in evidence, your Honor.

The Court: All right. It is admitted in evidence and marked Government's Exhibit No. 51 in evidence.

Thereupon said leave record was admitted in evidence and marked as Plaintiff's Exhibit No. 51.

Mr. Aug: Now will you answer the question, Mr. Marshall?

A. Leave record indicates Mr. Hollifield was absent for the period August 5th to 18th on an annual leave status.

Mr. Aug: No further questions, your Honor.

Cross-Examination, by Mr. Kelley.

Q. That is the only leave status indicated for that gentleman during that year?

A. No, sir, it is not. That is for that particular period. There are other periods of absence indicated on this record, inasmuch as it is an entire year's record.

Mr. Kelley: Would the reporter read back for me Mr. Aug's last question?

(Thereupon the last Q. on page 543, of the direct examination, was read by the reporter.)

Mr. Kelley: Thank you.

Q. Would you demonstrate for me where on that record leave status is shown, by what symbols?

A. In this column for annual leave, 80 hours, which represents 10 working days, which is our pay period at the Base.

Q. And would that be reflected under the date that he took this 80 hours?

A. This period ended on the 18th day of August. The previous period ended on the 4th of August.

Q. You mean he started the leave on the 4th?

A. No, sir. The 4th was Saturday. His leave actually started on the 6th day of August, which was the first working day in the period from the 5th to the 18th.

Q. That is the only one reflected for the month of August?

A. That is correct, the only annual leave of absence.

Q. Then four hours are shown here of annual leave ending on the 7th of July, for example.

A. Yes.

Q. What is the 48 hours?

A. 48 hours, period ending the 7th of July.

Q. Show when it started.

A. No, this record doesn't.

Q. If I correctly interpret this record, it demonstrates Mr. Hollifield took some annual leave in every month from January through September, doesn't it?

A. That is correct.

Mr. Kelley: That is all. No further cross-examination.

Mr. Aug: No further questions.

The Court: That is all.

MR. JOHN B. DeNEALE, being duly sworn, testified as follows:

Direct Examination, by Mr. Richter.

Q. State your full name, please?

A. John B. DeNeale.

Q. How do you spell that name?

A. D-e-N-e-a-l-e (spells).

Q. Where do you live, Mr. DeNeale?

A. In Fairborn, Ohio.

Q. What is your occupation?

A. I am special agent with the Federal Bureau of Investigation.

Q. How long have you been engaged in that occupation?

A. A little better than five years.

Q. Are you acquainted with the defendant Robert Hollifield, in this case?

A. I am.

Q. Will you step down and place your hand on his shoulder, please?

A. Yes.

Mr. Kelley: If the Court please, if my memory serves me, this witness was here before and sworn and went through this very thing. Didn't he?

Mr. Richter: No, not this witness. He has been sitting here as a representative of the government.

Mr. Aug: He was called to identify instruments and we reserved the right to recall the witness.

The Court: That is correct. Must be somebody here representing the government and, of course, the defendants are here.

(Thereupon the witness left the witness stand and put his hand on the shoulder of Mr. Hollifield.)

Q. All right. Have you ever had any conversations with Mr. Hollifield?

A. Yes, I have.

Q. When?

A. I had a conversation with Mr. Hollifield on August 6th. I mean, rather, October 6, 1951, October 9, 1951, October 17, 1951 and October 22, 1951.

Q. Taking the first in point of time, where was the first interview with him?

A. The first interview on October 6, 1951 was at Mr. Hollifield's residence at 2953 Arlene Avenue, Dayton, Ohio.

Q. Who was present at that time?

A. There was Mr. V. Allen Adams, another special agent of the F. B. I., myself, Mr. Hollifield, Mr. Hollifield's wife, part of the time.

Q. What time of the day was that?

A. That was in the morning.

Q. About when? Do you remember what time in the morning?

A. Not the exact hour, I don't remember.

Q. Roughly?

A. Roughly, I would say around 10 o'clock.

Q. Did you have any preliminary conversation with him before getting into the substance of your talks?

A. On that occasion I met Mr. Hollifield for the first time. I identified myself to him and told him I would like to interview him concerning information he had previously given to the F. B. I. and I told him that he didn't have to talk to us, he could have an attorney and that if he did talk to us it would possibly be used against him.

Q. Will you relate to the Court and the Jury the substance of the conversation which you had with him on that first interview?

A. Well, at that time, Mr. Hollifield told me he didn't want to talk to us at that time, that he had engaged Mr. Svoboda as his attorney and he would rather have Mr. Svoboda present in any further interviews. I started to leave and told Mr. Hollifield I would contact his attorney. He asked me to wait. We entered his house. He placed a call on the telephone and spoke to Mr. Meyring and then gave the 'phone to me. I spoke to Mr. Meyring and made an appointment to interview Mr. Hollifield in the presence of Mr. Svoboda on October 9th in my office.

Q. That terminated the first interview?

A. That terminated the first interview.

Q. Tell the jury and the Court what happened at the second interview.

The Court: Pardon me. Do you know who Mr. Meyring is?

The Witness: He is the gentleman sitting between Mr. Svoboda and Mr. Hollifield.

The Court: Did you know what his business is?

The Witness: He is an attorney with Mr. Svoboda, in the same office.

The Court: Go ahead.

Mr. Richter: Read the question.

(Thereupon the last Q. on page 183 was read by the reporter.)

Q. Was there anything of significance that happened at the second interview?

A. At the second interview, at that time, I wasn't real familiar with the case up until then and we merely reviewed with Mr. Hollifield and Mr. Svoboda what had been given to us previously by Mr. Hollifield in the form of a signed statement, through our agent, Mr. Clay Pardo.

Q. When did you have the first real interview with him that developed any significant information?

A. Concerning this?

Q. Concerning this situation.

Mr. Kelley: I object to the form of that question. What is real and what is significant is for the jury.

Q. When did you have your next interview with him?

The Court: All right.

A. My next interview was October 12th, if I recall.

Q. What transpired at that interview?

A. At that interview we talked about another party that—

Q. Did you have any discussion about Mr. Opper?

A. No, we didn't.

Q. When did you next have a discussion with him about Mr. Opper?

A. We discussed Mr. Opper in full on October 22, 1951.

Q. Will you relate to the Court and the Jury the substance of that conversation?

Mr. Kelley: Just a moment. If the Court please, I object until they fix the place, who was present.

Mr. Richter: All right.

Q. Who was there?

A. This October 22, 1951 interview was arranged prior, through Mr. Svoboda, Mr. Hollifield's attorney. The interview was conducted in the presence of Mr. Svoboda, Mr. Hollifield, of course, another agent of the F. B. I., by the name of Albert L. Dolson, myself, here in this building, in our office.

Q. Now will you relate what transpired at that interview?

A. At this interview I talked at length to Mr. Hollifield concerning his dealings with Mr. William J. Opper. Mr. Hollifield told me that the best he could recall, he first met Mr. Opper probably in November or December of 1950, at Wright-Patterson Air Force Base, in his office. He said that Mr. Opper was a dealer in surplus property looking for an outlet for his products to be sold to prime contractors holding contracts for the Air Force. He said it wasn't—he said on another date, shortly after this first meeting with Mr. Opper, Mr. Opper approached him to have goggles approved for use in survival kits being assembled for the Air Force, by various contractors. He told me that Mr. Opper showed him approximately three sets of goggles and said: "Some of them meet the specifications of the Air Force and some do not," but that from visual examination you can't tell them apart. And he said that Mr. Opper told him something to the effect that "If you can use them, I can make it worth your while" something to that effect. Mr. Hollifield couldn't recall the exact words and Mr. Hollifield couldn't recall exactly how he answered Mr. Opper. But he did say that he entered into an agreement with Mr. Opper at that time to approve his goggles for use in survival kits being assembled for the Air Force by various contractors. Mr. Opper was to be a sub-contractor to a prime contractor. He stated that at that time Mr. Opper never said any

definite amount of money to be paid to him for the approval of these goggles, but a short time thereafter, he couldn't recall the dates, he did agree to pay him—Opper agreed to pay Hollifield the sum of $1750 for arranging the approval of these goggles for use in survival kits.

Mr. Hollifield was at that time shown various R and R's, Routing and Record sheets and other memoranda, from the files of the Air Force, which I had in my possession, at that time, and he read them completely. There was one letter shown to him dated November 10, 1950 from Cappel-MacDonald requesting approval of goggles that would go into the E-1 kit, which were a glass goggle. There was an answer—Routing and Record sheet in answer to that by Mr. Hollifield to the Procurement Division of the Air Force, which gave Mr. Hollifield's approval in the use of these goggles. That was dated November 22nd.

Mr. Kelley: Just a moment, if the Court please. I object to this witness characterizing what a document did. The document would be the best evidence of what it said or purported to be.

The Court: Did this take place at this interview?

The Witness: Yes, sir.

The Court: I mean did you have the—

The Witness: I had the documents at that time in my possession.

The Court: Are they here in evidence?

The Witness: They are in evidence.

The Court: Get them out, will you please?

Q. Look these papers over and pick out the ones to which you are referring.

A. The first one I will refer to is Plaintiff's Exhibit No. 31. This is a letter from the Cappel-MacDonald and Company, Dayton, Ohio, to Headquarters Air Materiel

Command, Wright-Patterson Air Force Base, Dayton, Ohio, dated November 10, 1950 and marked to the attention of Mr. Robert Hollifield.

Mr. Kelley: Just a moment, if the Court please. I wasn't permitted to go into a bank statement. We are now confronted with it again. This is in evidence. I made an objection which I think is sound, that the instrument itself should be here and not what this witness thinks the instrument was and I think my objection was sound.

The Court: We went to all this trouble. I thought you were the one asked to get these documents out.

Mr. Kelley: I did. I didn't want this witness telling the jury what he thinks the document is, when it is in evidence.

The Court: What exhibit number is that?

Mr. Kelley: 31.

The Court: All right. Lay that down. What else did you have with you, if anything, by exhibit number?

The Witness: Plaintiff's Exhibit No. 44.

The Court: Lay that down. Now the next one, if any?

The Witness: Plaintiff's Exhibit No. 26.

The Court: Lay 26 down.

The Witness: 25.

The Court: Yes, sir.

The Witness: 27.

The Court: Yes, sir.

The Witness: Defendants' Exhibit G.

The Court: For identification.

The Witness: Yes, sir, for identification only. And Plaintiff's Exhibit 28-A and the reverse side is -B.

The Court: Those are the documents you had with you?

The Witness: Yes, sir.

Q. You may proceed, Mr. DeNeale.

A. I showed these Routing and Record sheets and letters or documents to Mr. Svoboda and Mr. Hollifield and had them read them over and asked Mr. Hollifield if those exhibits did not represent his effort in approving Opper's goggles for use by the Air Force, through prime contractors, and he said it did; that one set, one letter and one exhibit, there referred to the ski mountain goggle used by Cappel-MacDonald, the other Routing and Record sheets or exhibits referred to the plastic goggle.

Mr. Kelley: Just a moment. I renew my objection. They speak for themselves as to what they refer to

The Court: Yes. Pick out the one that refers to ski goggles. What is the number.

The Witness: Plaintiff's Exhibit 31 and Plaintiff's Exhibit No. 44.

The Court: Those are the two?

The Witness: That is right.

The Court: Very well. Go ahead. Don't read anything from it. Just lay them down.

Q. Who was it that said that these documents represented an effort to get the approval?

A. Mr. Hollifield. Mr. Hollifield told me at this time that he was up until this time certain that his dealings were only on the ski goggles. He didn't know that Mr. Opper was trying—he didn't realize anyway that Mr. Opper was trying to also sell the sun goggles. But after reading the R and R's—

Q. Which exhibit?

A. —he said he was certain that that represented his efforts in getting those approved.

Q. Which exhibits do you refer to?

A. Exhibits 28-A, 28-B, Defendant's Exhibit marked for identification G, Plaintiff's Exhibit No. 27, those three or four.

Q. Now you may proceed.

A. He said also that he looked at Plaintiff's Exhibit No. 28 and said he was the dictator of that letter and that he recalled that Mr. Opper was at Wright-Patterson Air Force Base on one occasion only that he could recall where they held a conference, and at this time he recalled he went to the office of Captain Strand, Lieutenant Moss, and had a conference concerning some goggles that they had rejected there. Mr. Hollifield did not remember who else was with him in that conference, but he remembered that Mr. Opper was there and that it was concerning goggles and he wasn't certain at that time that it was concerning plastic goggles. After he read these mentioned exhibits, he said that he knows now it was concerning that plastic goggle.

Q. Mr. DeNeale, you referred to Exhibit 28. There are exhibits 28-A and Exhibit 28-B.

A. That's right.

Q. Which of those did you refer to?

A. 28-A.

Q. 28-A?

A. Yes.

Q. All Right. What did Hollifield say with reference to Exhibit 28-A?

A. He said that he had dictated this R and R and that it represented his efforts or part of his efforts in getting goggles approved for Mr. Opper, in order that Mr. Opper could sell them to prime contractors.

Q. What else was said or done on that occasion? I mean after what you have just been talking about.

A. Well Mr. Hollifield was asked concerning the amounts of money he had received from Mr. Opper in connection with this agreement that he had entered into with Opper and, at this time, he told me that he received his first sum of money from Mr. Opper in March of 1951, as best he could recall and, at this time, he received $50 in

cash in Dayton, Ohio, while driving in Mr. Hollifield's car with Mr. Opper, from Wright-Patterson Air Force Base, to the VanCleve Hotel, in Dayton, Ohio, for lunch. And at this time I asked if he recalled anything he said to Mr. Opper about the sum of $50 being given to him, when he was supposed to receive $1750. He said the only remark he gave Opper was that it was a long way from $1750. Then I asked him concerning the next payment. He said during the same month, March of 1951, he received approximately $200, or $250, from Mr. Opper under the same conditions, while Mr. Opper was in Dayton and while Mr. Opper and Mr. Hollifield were riding from the Wright-Patterson Air Force Base to the VanCleve Hotel for lunch.

Then I asked him concerning the next sum of money received. This time he told me it was in April 1951 and I asked him concerning the circumstances which led up to that payment. He said that he recalls that he had 'phoned or telephoned Mr. Opper long distance from his home in Dayton, Ohio to Mr. Opper's home in Chicago, Illinois. He placed a person to person 'phone call. He didn't know the telephone number at that time, but he said he formerly had it on a slip of paper. He had destroyed his notes. He said he called Mr. Opper the night before he went to Chicago and he traveled to Chicago on a Saturday. He said in this telephone conversation he asked Mr. Opper for some money and told Opper that he would be in Chicago the next day. He said that the following day, which was Saturday, in April, and after looking at the calendar he felt it was probably about the middle of April, he had traveled by T. W. A. Air Line, or he felt it was T. W. A. Air Line, he didn't know the exact air line, but he felt it was T. W. A., to Chicago, and had gone to the office of Mr. Opper, which he only recalled it was near the East Side of Chicago. When he went to the office he found Mr. Opper was not there. He went down on the street, outside of the building where Mr. Opper had his office. He waited for Opper and Mr. Opper showed up shortly after that.

Mr. Hollifield told me that at the time he first saw

Opper when he showed up in April 1951, in Chicago, Opper made the remark he had just been to the bank and he had the money. He said they then went to Mr. Opper's office and it was there that Mr. Opper gave him $1000 in cash and Mr. Hollifield said he returned to Dayton that same day by T. W. A. Air Line, making the round trip, which was on Saturday.

He told me that the next sum of money paid to him, which would have been the fourth sum of money, was in Chicago, Illinois, and he felt it was in—I believe in May. Yes, in May of 1951. Mr. Hollifield explained that his mother-in-law resides in Chicago and that he had been in Chicago visiting with his mother-in-law, his wife present, and was having dinner with Opper, Mr. Opper and Mr. Opper's wife, in the Wrigley Building Restaurant, in Chicago, and on that occasion while having dinner, Mr. Opper and Mr. Hollifield left the table, went to the men's rest room, and it was in the men's rest room that Mr. Opper gave Mr. Hollifield an additional $100.

Mr. Hollifield told me that the last sum of money received from Mr. Opper was just prior to the time that he took a vacation on August 5, 1951. I arrived at that date with Mr. Hollifield by showing him his leave records and we ascertained that he had an extended leave starting on August 5th. He said just prior to this time, August 5th he felt it was one or two days prior, at that time that he made a long distance telephone call to Mr. Opper, in Chicago, and requested Mr. Opper to come to Dayton and give him some additional money on the $1750 sum. Mr. Opper came to Dayton, quoting Mr. Hollifield, a couple of days after the telephone call and sometime prior to August 5th, when he went on his vacation, and in Dayton gave him an additional $200 on this agreed $1750 sum.

Now, that was all the funds that Mr. Hollifield told me that he had received from Mr. Opper on this agreement.

Q. Anything else said after that?

A. I questioned Mr. Hollifield at some length concerning what he had done with this money, which amounted at this

time to approximately $1550. I asked him whether he had any large debts or anything of that nature to pay off. He said he didn't. He said the only thing he had done with this money was just lived like he wanted to. He used it as pocket change, for pocket money. He spent it as he needed it for such things—I recall one thing, he spent around thirty some dollars for some hardware to be used in his house and various articles of that nature. He had no large debts and paid off no large sums of money.

Q. Anything else?

A. He insisted that the money was not a loan from Mr. Opper. I asked him concerning that to quite an extent. He said the money was definitely not a loan.

Q. Anything else? Oh, yes. Who was present all during this interview?

A. During this entire interview, Mr. Frank Svoboda, Mr. Hollifield, Mr. Albert L. Dalson of the F. B. I. and myself.

The Court: Do you know Mr. Svoboda?

The Witness: Yes, sir, I do.

The Court: Is he here in the court room?

The Witness: The gentleman sitting in the blue suit beside Mr. Meyring.

The Court: What is his business, if you know?

The Witness: He is an attorney here in Dayton.

The Court: He was present all the time, you say, this took place?

The Witness: During every interview I had, yes, sir.

The Court: I meant this last interview.

The Witness: Yes, sir.

Mr. Kelley: May it please the Court, sometime ago in this case the government introduced a number of written statements taken from Mr. Hollifield and oral conversa-

tions. Then yesterday late and today we have gone into facts of another type. I do not wish to try the patience of the Court nor of the jury, but I respectfully ask again in the interests of justice that the Court once more admonish the jury that as to this latest testimony concerning conversation had with Mr. Hollifield, that they may not under the law and under their oaths give any consideration to it at all, in any of its aspects as to what he said about the papers or anything else as respects the defendant Opper.

The Court: I will adopt every word that counsel has stated, Members of the Jury, as if I were saying them myself, because I couldn't say them as well. I think it is exactly correct. You must not, as I have heretofore advised you, or cautioned you, you must not consider anything that Mr. Hollifield said in the absence of Mr. Opper as any evidence against Mr. Opper. You can consider it always, of course, as evidence against Mr. Hollifield. When you come to consider that part of the case, you are to give it such consideration as you deem it properly deserves. It is equally true, as I have already told you, all these statements that Mr. Opper made, they are not to be considered against Mr. Hollifield. You understand that. But you may consider that, when you come to that part of the case, if you do, as testimony about Mr. Opper himself and give it such weight as you deem it properly deserves.

Mr. Kelley: Thank you, your Honor.

Cross-Examination, by Mr. Kelley.

Q. Mr. DeNeale, as I understand it, you referred to four separate occasions upon which you undertook to interrogate Mr. Hollifield?

A. That is correct.

Q. The 6th—

A. Actually five. It was in December again that I talked to him for a brief time. I neglected to mention that when I talked to him in December 1951.

Q. But you have mentioned up to now the 6th, 9th, 17th and 22nd of October?

A. 6th, 9th, 17th and 22nd, yes.

Q. Have you relied altogether on your memory and picture of these occasions, your memory, recollection?

A. Not at all. I have notes.

Q. You refreshed yourself very recently from these notes?

A. Very recently several times.

Q. Where are they?

A. In my pocket.

Q. May I see them?

A. (Witness produces notes.)

Q. I would like to see all the notes you made in respect to these interrogations?

A. There are the interview logs and another interview log in evidence. I have five of them there. These are the notes I made when I was interviewing Mr. Hollifield concerning Mr. Opper.

Mr. Kelley: Mark these for identification K to P, inclusive.

Thereupon notes and interview logs were marked for identification as Defendants' Exhibits K, L, M, N, O and P, inclusive.

Q. I show you Defendants' Exhibit K for identification. Can you identify it?

A. Yes. They are my notes that I made during the course of interviewing Mr. Hollifield on October 22, 1951.

Q. And Defendants' Exhibit L for identification, what is that?

A. This is a form called an "Interview Log", which we fill out and it is one I filled out on October 6, 1951, after talking to Mr. Hollifield, at his home, 2053 Arlene Avenue, Dayton, Ohio.

Q. To the same extent, will you identify Defendants' Exhibit M for identification?

A. This is also an interview log form and it reflects the hours that I interviewed Mr. Hollifield on October 9, 1951.

Q. Defendants' Exhibit N?

A. Interview Log which reflects the hours that I interviewed Mr. Hollifield on October 17, 1951.

Q. And as respects Defendants' Exhibit O for identification?

A. This is an interview Log which reflects the hours that I interviewed Mr. Hollifield on October 22, 1951.

Q. Thank you. And Defendants' Exhibit P for identification?

A. This is an interview log—

Mr. Richter: If the Court pleases, we object to this exhibit which counsel is interrogating the witness about at this time.

The Court: He is only having it identified. He may have it identified.

A. It is an interview log which reflects the period that I interviewed Mr. Hollifield on December 5, 1951.

The Court: Now, pardon me a second. I think, Mr. Kelley, Miss Fischer has marked these exhibits on the envelope only. I think we should have the same exhibit number now put on the contents of each envelope so that it would correspond with the envelope and there won't be any question about it. Otherwise they may get mixed up.

(Thereupon the contents of the envelopes were marked to correspond with the letter on the envelope.)

Q. Now, Mr. DeNeale, you have produced in addition to the logs of interview, you have produced one exhibit marked Defendants' Exhibit K for identification, being your notes made during the course of the interview 10/22/51?

A. That is right.

Q. Do you have your notes made during the interview of October 6, 1951?

A. No, I don't, other than what was on that interview log. So I didn't keep any logs on that date.

Q. You didn't make any notes that day?

A. Other than the notes which appear on the bottom of the interview log which you have.

Q. Did the agent who accompanied you—Who was he on that day?

A. He was Special Agent V. Allen Adams, I am sure, if you look.

Q. If you are sure, I will look if you say so. I will let you.

A. That is correct, V. Allen Adams.

Q. Did you observe whether special agent V. Allen Adams kept any notes?

A. He had no cause to. It was my case.

Q. I didn't ask that, sir.

A. I am sorry.

Q. Recall my question?

The Court: Do you know, did he keep any?

The Witness: He kept no notes whatsoever.

Q. How about your notes as to the interview of October 9, 1951?

A. I have notes on the interview of October 9, 1951.

Q. Where are they?

A. I have them with me.

Q. Would you produce them, please?

Mr. Richter: If the Court please, unless those notes refer to Mr. Opper, we object to their being produced.

The Court: I haven't the faintest idea.

Mr. Kelley: I would have to look at them before I know whether they do or do not. I am not offering them in evidence.

Mr. Richter: I think the witness stated the interview of October 9th didn't have to do with Mr. Opper.

Mr. Kelley: That is what the witness said.

The Court: They can have them marked for identification, if they wish.

The Witness: I have them here.

Mr. Kelley: Mark this Q for identification.

Thereupon said notes of Oct. 9, 1951 were marked for identification as Defendants' Exhibit Q.

Q. Show you what has been marked for identification Defendants' Exhibit Q. If you can identify it, state what it is.

A. Yes. These reflect the result—these are the notes that I took on October 9, 1951.

Q. In relation to an interview with Mr. Hollifield—

A. I told you I didn't have any notes of an interview on October 6th. I am sorry. I do.

Q. You do?

A. Yes, sir.

Mr. Kelley: Mark this R.

Thereupon notes of the Oct. 6, 1951 interview were marked for identification as Defendants' Exhibit R.

Q. Showing you what has been marked Defendants' Exhibit R, will you state whether you can identify it and, if so, what is it?

A. These are my notes as to what occurred on October 6, 1951.

Q. During the course of your interview with Mr. Hollifield?

A. Let's see. Yes.

Q. Now, Mr. DeNeale, do you have your notes that you made in connection with the interview of October 17th?

A. I do.

Q. Would you produce those, please?

A. (Witness produces notes as requested by counsel.)

Mr. Kelley: Mark these S and T.

Thereupon two documents were marked as Defendants' Exhibits S and T, respectively, for identification.

Q. Mr. DeNeale, I show you what has been marked for identification as Defendants' Exhibit S and ask you whether or not you can identify it?

A. Yes.

Q. What is it?

A. These are notes I made on October 17, 1951, showing the results of an interview with Robert George Hollifield.

Q. I show you what has been marked Defendants' Exhibit T for identification. Can you identify that?

A. These are the same thing: They are notes of an interview on October 17, 1951, with Mr. Robert George Hollifield.

Q. They are not the same thing, are they? They are additional notes.

A. They relate to different matters

Q. Mr. DeNeale, I show you Plaintiff's Exhibit 31, Plaintiff's Exhibit 44, Plaintiff's Exhibit 26, Plaintiff's Exhbiit 25, Plaintiff's Exhibit 27 and Plaintiff's Exhibit 28-A and 28-B. I believe you testified that you handed these documents to Mr. Hollifield, during the course of one of these interviews.

A. Yes, I did.

Q. Which interview was that?

A. This interview was the one on October 22nd, I am certain.

Q. On direct examination you testified as to which interview it was.

A. Yes, it was October 22nd.

Q. Have you forgotten since, without looking at your notes?

A. October 22nd was the one these instruments were exhibited to him. I might say here one or two of these, I don't know which ones they were, I merely had copies of them. I had the carbon copies from the files of the Air Force instead of the originals.

Q. They were carbons of first impressions, as far as you know?

A. As far as I know.

Q. I am asking you, were you in doubt when you testified under direct examination a few moments ago at which interview you exhibited those? Are you in doubt now?

A. I am not in doubt now. They are on October 22, 1951.

The Court: Is that when Mr. Svoboda was present?

The Witness: Yes, sir, he was present.

The Court: The lawyer?

The Witness: Yes, sir.

Q. And I show you Defendants' Exhibit G. Did you include that among the documents that you showed Mr. Hollifield on the 22nd of October?

A. I showed this to Mr. Hollifield, yes.

Q. I said on the 22nd of October.

A. On the 22nd of October, I am certain I showed this to Mr. Hollifield.

Q. You questioned him about each of these documents?

A. I did.

Q. Had you theretofore interrogated other persons whose names appear herein, with respect to these documents and what they referred to?

A. I had interviewed some of those persons.

Q. Who?

A. Not all of them.

Q. Who had you interviewed previously?

A. Those documents carry the initials, names, Fred Moss, Captain Strand.

Q. Had you interrogated Mr. Moss prior to exhibiting this to the defendant Hollifield?

A. Yes, I had talked to Mr. Moss.

Q. Prior to exhibiting this and had discussed these documents with Mr. Moss?

A. I am almost certain I did, yes.

Q. And what others?

A. Well, take them one by one.

Q. All right. Take Defendants' Exhibit G for identification.

A. I had discussed this with Lieutenant Moss and Captain Strand, at Wright-Patterson Air Force Base.

Q. Prior to exhibiting this and interrogating the defendant Hollifield about it?

A. I feel it was prior. I am not certain now.

Q. Where did you get this document from?

A. I obtained that document from the files at Wright-Patterson Air Force Base.

Q. In whose file was Exhibit G?

A. I might say here that most of these exhibits were given to me by the Office of Special Investigation, at Wright-Patterson Air Force Base. They had contacted this investigation prior and had obtained these from the various project files there.

Q. You see there is a third name on the Defendants' Exhibit G, is there not?

A. There is a Dr. Heim signature, J. W. Heim.

Q. He is the head of the branch?

A. He is the chief.

Q. Had you interviewed him too?

A. I had never talked to Dr. Heim about this.

Q. Let's, Mr. DeNeale, take up—These are not sereatus. Let's take Plaintiff's Exhibit 28-A. Had you discussed that with Captain Randall W. Briggs before you presented it to Mr. Hollifield?

A. Either prior or shortly thereafter, I talked to Mr.—or now Major Briggs about this document, and I have had the document with me when I talked to him.

Q. Now one other signature appears thereon, in addition to the signature of Captain, now Major Briggs, doesn't it?

A. Norris N. Murray.

Q. Have you ever interrogated Norris N. Murray?

A. Mr. Murray was in Germany during the time I was making this investigation and not available for interview.

Q. My question has not been answered.

A. I have not interviewed Mr. Norris Murray.

Q. At any time?

A. At any time, to my knowledge, not during this investigation, at any rate.

Q. Do you have any knowledge as to whether he was brought back from Germany for interrogation by any of the officers?

A. I haven't any knowledge.

Q. You haven't any knowledge that any other agent has interrogated Mr. Murray?

A. No.

Q. You stated in questioning Mr. Hollifield about this particular exhibit that he admitted to you that he initiated this document, because his initials appear thereon.

A. Mr. Hollifield said that they were his initials, that he was the dictator of this and that he did recall the conference between himself, Mr. Murray, Captain Strand, Lieutenant Moss and Mr. Opper.

Q. Didn't he tell you there was considerable doubt in his mind as to whether he initiated it, because he had not signed it, and that sometimes their stenographer made errors of that kind? Didn't he mention that or discuss that with you, sir?

A. I don't recall. Mr. Hollifield, during this entire interview, kept saying he wasn't certain of anything; he wasn't certain of this and he wasn't certain of that, and that was probably the reason for the several interviews, tried to—

Q. Just a moment. You volunteered that, the reason for the several interviews. Now, at the interview when you presented that document to the defendant Hollifield, you say that you were present?

A. That is right.

Q. That Mr. Hollifield and his attorney—one of his attorneys, Mr. Frank Svoboda was present?

A. That is right.

Q. And another gentleman?

A. Right.

Q. Now, I ask whether or not, while you were discussing this particular document with Mr. Hollifield, he, Mr. Hollifield didn't express doubt to you as to whether he had initiated it; that is to say, written out in longhand what was then typed up, because his signature should have appeared there, and furthermore said mistakes had frequently been made of that character by their stenographer? Didn't he discuss that in the presence of Mr. Svoboda?

A. He didn't tell me that. He said he had dictated this, his initials were on it. He did tell me, as I stated on direct examination—You want me to go into this?

Q. If it is in response to my question.

A. This exhibit here is in relation to the plastic goggle. Mr. Hollifield did tell me that he thought his dealings were all in relation to the ski goggles and not the plastic goggles, and up until the time that I showed him these documents he didn't recall this deal, but he did after I showed it to him.

Q. Is it your testimony upon oath that at no time during that interview or any other time, Mr. Hollifield hasn't raised the question of doubt as to whether or not he initiated 28-A, because his signature doesn't appear there? You say he never raised that question with you?

A. No. To the best of my knowledge he never did raise the question, but did as to whether his initials appearing on here were an error.

Q. Will you tell this jury under oath that he did not raise that question to you at any time?

A. To the best of my knowledge he did not raise that question as a doubt. I showed him this R and R, with his initials, and asked him if that didn't reflect he was the dictator. He said yes. I asked him if that didn't reflect his efforts in getting these ski goggles approved. He said yes.

Q. Now, Mr. DeNeale, since that time, you have been aware of the fact that a doubt exists in respect of whether or not Mr. Hollifield truly initiated that by writing out in longhand? You have been aware of that, haven't you?

A. There was some question, not on this instrument, but on another one, yes. I recall some doubt concerning another instrument, not this.

Q. Haven't you, in the recent past, by that I mean, let's say, within the last five or six weeks—

A. One reason—

Q. Let me finish.

A. May I—

Q. Do you want to correct a statement?

A. No. I will make something a little more definite. One reason Mr. Hollifield was certain he had dictated this, as I recall now—

Q. You may tell us what he said.

A. Yes, what he said. He said: "There is an error in here. It refers to the E-1 kit in this R and R." He said: "That was my project. In dictating it, I probably said 'E-1 kit', either wrote 'E-1 kit' or dictated 'E-1 kit' in error, because that was my project and Mr. Murray was with the D-1 kit. But this goggle is in reference to D-1 kit and I would be more apt to make a reference to the E-1 kit in error."

Q. Now let me come to my question: Since the interview and the time you discussed that document 28-A with Mr. Hollifield, have you interrogated, with respect to that very document, Norman K. Hanselman?

A. I haven't personally talked to Mr. Hanselman about this particular document. Another document, yes. There was some question. I talked to Mr. Hanselman about it, but not this particular document, I don't believe.

Q. In talking to Mr. Hanselman did you not discuss the fact that errors occur on the part of the stenographer, in determining whose handwriting was on a document given to her to type up, an R and R, which led to the mistake of placing the wrong man's initials next to hers?

A. Yes, on another R and R, but not this one.

Q. That was the nature of the mistake?

A. Yes.

Q. He told you precisely that same kind of error oc-

curred and had occurred with him in one of these other documents, didn't it?

A. He said he thought so.

Q. Now, have you not interrogated the stenographer whose initials appear on 28-A, with respect to an error in putting down the wrong initials of the inspector?

A. I personally didn't go over that with that stenographer.

Q. Did some other agent?

A. No.

Q. You know of no one in the Bureau who has interrogated her with respect to such an error at all?

A. No, I know of no one in the F. B. I. that has.

Mr. Richter: If the Court please, these questions are directed not to the testimony that this witness has brought out on his direct examination. I think they are proceeding beyond that. If they want to go into these matters as part of their defense, it is perfectly all right, but we don't think it is proper at this time for cross-examination.

The Court: It is all right. Go ahead.

Mr. Kelley: Read the last question and answer.

(Thereupon the last Q. and A. on page 210 was read by the reporter.)

A. (Continued) No one in the F. B. I. has talked to this young lady about this. I might say that I have arranged for an interview with this young lady, but I haven't talked to her myself about this.

Q. You arranged for an interview about that question; is that it?

A. Yes.

The Court: What is this you are talking about?

The Witness: This is Plaintiff's Exhibit No. 26 in evidence.

Q. Now, what among those documents you have before you was the one you interrogated Mr. Hanselman about, with respect to an error of this character?

A. This document here is the one.

The Court: What is the exhibit number?

The Witness: Exhibit No. 26, Plaintiff's Exhibit No. 26.

A. (Continued) This exhibit is the one that I know some question has arisen on, as to who the dictator of it was. I know that Mr. Hanselman has told me that he didn't think that this wordage in this exhibit was in his language. He felt that he usually words things different than that and he felt that the dictator of this was probably Mr. Hollifield.

Q. Well, now, haven't you been told, not only by Mr. Hanselman, but others at the Field, that it was the custom and the rule and regulation in the preparation of R and R's that they would be prepared in longhand and submitted to a stenographer, that she would have to determine frequently where no initial or signature appeared, from her interpretation of whose handwriting it was who had written it and thus initiated the R and R, and that having thus undertaken to determine who it should be or would be, she would put that person's initials down next to hers? You have been told that, haven't you?

A. I have not. I have heard that here in this court. I haven't been told that.

Q. Has no one told you, including Mr. Hanselman, that the first person to sign under the word "concurrence", under the regulations covering R and R's, is the same person whose initials appear at the right?

A. No one has told me that. I have heard that here in court. The only thing I have heard from Mr. Hanselman concerning his initials here, he didn't thing he dictated that, because of the wordage in that he thought Mr. Hollifield had.

The Court: What exhibit?

The Witness: 26.

Q. He didn't tell you that he was satisfied that he didn't, because he hadn't signed it? Didn't he tell you that?

A. I don't recall him saying that, no. His basis for his statement was the wording of the exhibit here.

Q. What initials appear on 26?

A. "N. K. H."

Q. What are the initials of N. K. H.?

A. Norman K. Hanselman.

Q. Does Mr. Hanselman's signature appear there?

A. No.

Mr. Kelley: May we break here?

Mr. Aug: Your Honor, may we approach the Bench?

(Counsel confer at the Bench with the Court off the record.)

The Court: Members of the Jury, we are about to recess the further hearing of this case until tomorrow morning at 11 o'clock, and during this interval you will bear in mind my usual admonition and return here, if you please, at 11 o'clock tomorrow morning. You will return, Mr. DeNeale, if you please, at 11 o'clock tomorrow morning, so they can go ahead with your cross-examination.

Adjourn court until 11 o'clock tomorrow morning.

Thereupon the further proceedings in the trial of this cause were adjourned until tomorrow morning at 11 o'clock.

Morning Session.

Friday, May 23, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

MR. JOHN B. DeNEALE resumed the witness stand and testified further on **cross-examination**, as follows.

By Mr. Kelley:

Mr. Kelley: Shall I proceed, your Honor?

The Court: Yes, sir.

Q. Mr. DeNeale, when were you first assigned to work on this case?

A. The case was assigned to me, best I recall, on October 2, 1951. I didn't receive it—there was a while in the mail. I think it was on October 4th before I received it.

Q. By "it" you mean the composite file that had been built up in the case at that time?

A. The assignment card which we receive.

Q. Who assigned you to this case?

A. This case was assigned off of the Assistant's desk, which was Mr. Thomas Gearrity.

Q. Approximately then, eight months have elapsed from the time you were first assigned to this case?

A. That would be about correct.

Q. Now, during that period of eight months since you were first assigned to the case, up until today, have your duties been confined exclusively to work on this case?

A. No.

Q. You have had many and varied duties on other cases, have you not?

A. Quite a number.

Q. Would you say, Mr. DeNeale, that you possess a good memory?

A. I possess a good memory, yes.

Q. Could you perhaps be confused as to which particular date of interview it was that you presented to Mr. Hollifield certain exhibits?

A. Mr. Kelley, if you will hand me my notes I think I can pretty well show that it was on October 22nd that I presented Mr. Hollifield the exhibits I mentioned yesterday to review and also Mr. Svoboda.

Q. Your notes are necessary to you in connection with your testimony, aren't they, in refreshing your memory?

A. My notes are not completely necessary, no, by far.

Q. But you very much desire to have them for giving sworn testimony?

A. I think my notes reflect that I did show him this R and R.

Q. Mr. DeNeale, why, on the five occasions that you interviewed him, did you make notes?

A. I made notes primarily for the purpose of dictating the contents of my notes into reports.

Q. Into the customary F. B. I. report?

A. That is right.

Q. That is one of your duties, is it not?

A. That is right.

Q. After you develop an aspect of an investigation and let us say if it involves the interviewing of a subject or witness, you make notes during the course of that interview, don't you?

A. That is correct.

Q. Obviously you make them so you will have a good guide and not trust to your memory?

A. A fairly good guide. We trust to our memory to a certain extent, but we would want to keep from having to rely too much on our memory.

Q. Exactly. And now after making the notes of these various interviews, was it immediately or very shortly thereafter that you used them and dictated your formal F. B. I. report?

A. Very shortly afterwards.

Q. And you have copies of those reports in your files, haven't you?

A. We have copies of those reports.

Q. And before coming here yesterday to testify as a witness for the government, it is a fact, is it not, that you not only refreshed your memory from your handwritten notes, but also from the reports which you prepared in this case?

A. I haven't refreshed my memory from the reports up until last night, for a period of about a week or more.

Q. But you have, as of this moment, very recently refreshed your memory from a reading of the F. B. I. reports which you dictated?

A. This morning.

Q. Where are those reports?

A. My reports are in my office.

Q. In this building?

A. In this building.

Q. Can you obtain them for me, please?

A. Those reports are by directive of the Attorney General confidential.

Q. Everything that is in them?

A. Everything that is in them.

Q. And yet it is a fact that you prepared those reports from your handwritten notes within a matter of hours or days after the interview in question?

A. Within a matter of days.

Q. And you have actually used them, even as late as last night to refresh your memory?

A. I have.

Q. And you say that you are not permitted to let me see those reports, to determine what you refreshed your memory from?

A. By Administrative Order 3229 we are not permitted, no, sir.

Q. Are you aware of the fact that the United States District Judges, on many occasions, in situations of this kind, have ordered that they be produced, because you have refreshed your memory from them?

A. I am aware—No, I wouldn't say that I am aware. I am aware that there is a possibility that the Attorney General may so order such a thing.

Mr. Kelley: May it please the Court, I respectfully move that your Honor require the witness to produce these reports upon the basis that he has admitted that as late as last night he used them to refresh his memory as to this case.

Mr. Richter: If the Court please, the witness in his testimony on direct, did not use his notes and for that reason we object.

The Court: Will you object to it?

Mr. Richter: Yes, your Honor.

The Court: All right. I will sustain the objection but direct counsel for defendants to take the matter up with the Attorney General of the United States. If the Attorney General says those reports may be produced at this trial, of course, the Court has no objection to it. But these reports the witness testifies are confidential. You Gentlemen can communicate between now and Monday morning with Washington and find out through the Attorney General if he is willing that these particular reports may be put in evidence. If so, it is quite all right with me.

Mr. Kelley: All right, your Honor.

Mr. Richter: If the Court please, with further consideration that the witness has testified that the notes which are already in the possession of counsel and the Court, were the basis of the notes which he has made the subject of his confidential report.

The Court: I understand that. What he is talking about is the official report.

The Witness: That is right.

The Court: That you have to make to your superior which, in turn, goes to Headquarters, copies of it, in Washington?

The Witness: That is right.

The Court: Very well. I will sustain the objection to that, with the understanding counsel may communicate with the Attorney General and if he says it is all right, then I will overrule the objection.

Mr. Kelley: We will try our luck, your Honor, and see if we get them.

The Court: That is all right.

Q. Mr. DeNeale, when you prepare such a report, it is made up in multiple copies, is it not, one or more of which goes to the special agent in charge, some to Washington and some to the United States Attorney in the District where you work?

A. This is correct.

Q. So copies of these reports would not only be with the Bureau in Washington, but with the United States Attorney and in your office of the F. B. I.?

A. This is correct.

Q. Now, in preparing those reports, you did undertake to set forth as fully as possible everything that appeared to be substantial and important to you, that took place in the interview, didn't you?

A. Yes, I did.

Q. And not to leave out anything that was said that was of importance?

A. I did.

Q. And you had your notes to guide you in preparing them?

A. I had my notes and various other Air Force documents.

Q. And we are referring to those which you have already identified here?

A. Part of those, yes.

Q. And you had others that you used in connection with these interviews that have not been mentioned?

A. Yes.

Q. What were they?

A. Air Force files.

Q. You used them in the course of the interrogation of Mr. Hollifield?

A. In the course of the interrogation of Mr. Hollifield, I used some that haven't been produced here.

Q. Then will you identify for us what you did use that have not yet been produced here?

A. I used some Routing and Record sheets which relate to scissors. No. These were all on other matters not pertaining to this particular case.

Q. What do you mean those were all on other matters not pertaining to this particular case? You mean not pertaining to Mr. Opper, is that it?

A. That is it.

Q. But pertaining to Mr. Hollifield?

A. That is it.

Q. Without exception these other documents that have not been produced here as yet did relate to Mr. Hollifield but in no way related to Mr. Opper; is that it?

A. I feel that is a very correct statement.

Q. Now, on your direct examination yesterday, I believe you stated that the first date upon which you interrogated, and in fact ever saw Mr. Hollifield, was on the 6th of October 1951?

A. That is the first date I ever met Mr. Hollifield.

Q. You went to his home on that occasion, did you not?

A. I did.

Q. At first, yesterday, in your direct examination, you said you made no notes as to the 6th, but later on corrected and said that you had. Is that it?

A. That is right, when I found those notes stuck to the back of some others. I had completely forgotten.

Q. Up until the moment that you ran across it and your memory was refreshed, your memory was faulty, wasn't it?

A. Yes, on this particular matter.

Q. Now, will you tell us just what took place, in sequence, when you went out to the Hollifield home, on the 6th of October?

A. I went to Mr. Hollifield's home on October 6th with Special Agent V. Allen Adams. Mr. Hollifield answered the door, or his wife answered it. I am not positive as to that. But I talked to Mr. Hollifield outside of the house for a very short period; told him I wanted to inter-

view him. Mr. Hollifield told me he wouldn't be interviewed again without the presence of his attorney and I started—I told him that is the way we would like to have it, too, and I told him he didn't have to talk to us. I started to leave, having in mind that I would contact his attorney—find out who his attorney was and contact him, and Mr. Hollifield called me back and told me that he would call his attorney. We went into his home and his wife was present. I believe his wife was asked to leave, if I am not in error. I met his wife there in the house and he called his attorney's office. He spoke for a while to an attorney, or to a person I was later introduced to by telephone as Mr. Meyring, and then he handed the 'phone to me. I talked to Mr. Meyring, told him my purpose: I would like to interview Mr. Hollifield; he had indicated he wouldn't talk further without an attorney and I asked for an appointment. Mr. Meyring arranged an appointment with me for an interview with Mr. Hollifield, in the presence of Mr. Frank Svoboda, on October 9th, in my office. I left then.

Q. Now, as I understood your testimony, on direct examination, yesterday, I thought you said that the first thing you did when you got to the house was introduce yourself, having seen him for the first time, and then identified yourself as an F. B. I. agent, and immediately then told him that you wanted to interview him concerning information previously given the F. B. I., and told him he didn't have to talk to you; he could get an attorney and if he did talk it possibly would be used against him. Did you so testify?

A. I so testified and I believe what I have just said is substantially the same, other than I didn't mention the fact right now that I had identified myself and introduced myself.

Q. Did you tell him that he didn't have to talk that he could get an attorney and anything he said, if he did talk, might be used against him? Did you tell him that at the very outset of your conversation?

A. Mr. Kelley, it is a very strict rule in the F. B. I.—

Q. Answer my question. I didn't ask you about rules of the F. B. I. at all.

A. All right. I did definitely. We are required to so do.

Q. And you were standing out in front of his house when you told him that?

A. Yes.

Q. Isn't it a fact, Mr. DeNeale, that he started to and that his wife stopped him and said: "Don't you think that you ought to call your attorney, since you have already consulted him?"

A. If that took place, I don't recall it.

Q. Now, on each occasion that you interviewed Mr. Hollifield, and tell me if I am stating the occasions by proper date, October 6th, October 9th, October 17th, October 22nd, and some day in December—

A. Yes.

Q. On each of those occasions did you follow the strict rule of the F. B. I. and advise Mr. Hollifield that he didn't have to talk to you, that he could have his attorney present, if he did talk, what he said might be used against him?

A. I recall very well that I told him that on the first two or three occasions and each time his attorney was present. His attorney was there to protect his—

Q. I didn't ask you that, Mr. DeNeale. All I asked you was whether on each occasion you advised him of those three things?

A. Probably not on the last couple of occasions. I would say not because it had been previously said on at least two or three occasions.

Q. Are you guessing when you say "last two or three"? Are you guessing now, sir?

A. I am guessing without seeing my interview logs, as to exactly what I said.

Q. You examine them and see if you told him that each time.

A. On October 6th I told him that at 10:20 a. m.

Q. By that you mean each of those three things, that he didn't have to talk to you, that he could have his

lawyer present, if he did talk, anything he might say might be used against him; is that right?

A. Yes.

Q. All right. That is October 6th.

A. On October 9th I told him that in the presence of his attorney at 11 o'clock in the morning and I also have a note here that he was told the same thing on September 26th.

Q. You weren't there on September 26th, were you?

A. I wasn't there. I was relying—

Q. That is just hearsay, isn't it?

A. Not exactly. It was in a signed statement.

Q. You weren't there, were you?

A. I wasn't there but I certainly believe a sworn and signed statement.

Q. It is not your knowledge at all?

A. Other than what I had in my possession a signed, sworn statement.

Q. I am not arguing with you. I just want to know if you were there and you weren't, were you?

A. I was not present. On October 17th, I advised him that.

Q. All three things?

A. Yes. I told him he was not required to make a statement. I said it might be used against him in court and advised him about his right to have counsel, at 11 o'clock in the morning.

Q. All right. How about the 22nd?

A. On the 22nd I merely have "prior" written in front of those two, or three statements. Two statements covered in one, which would indicate I didn't tell him that on that day.

Q. How about December, have you refreshed yourself from the F. B. I. reports as to the date in December that you last talked with him?

A. I had my interview log here.

Q. I don't recall your mentioning the date yesterday.

A. I haven't read that portion of my report for quite a while, but—

Q. I am asking only about the date.

A. December 5, 1951. I didn't tell him that. I have "previously" written beside those two statements or three statements here in that interview. I told him that previously.

Q. On the 6th, 9th and 17th you did advise him of his constitutional rights. On the 22nd and December 5th, you did not.

A. Whatever those dates are.

Q. On the 6th of October, when you say you advised him of those three things pertaining to his constitutional rights, in front of his house,—

A. They are not constitutional rights.

Q. They come under the Bill of Rights.

A. I think they are derived from the Bill of Rights.

Q. All right. We won't argue that. Now, in telling him, following the strict rule, as you put it, of the F. B. I., those three things concerning his rights, Mr. DeNeale, as an agent of the government you would have felt he was entirely justified under those rights guaranteed by the Bill of Rights to have said he preferred not to answer any more of your questions. He would have been justified, wouldn't he?

A. Very justified.

Q. And if he had said he preferred not to answer any questions, that he had already answered fully, it would have been your duty to leave him alone, wouldn't it?

A. No, I wouldn't say it would have been my duty. It is my duty to collect facts.

Q. Would you have argued with him and thus weakened in his mind his right to refuse?

A. I would have told him that I wanted to interview him.

Q. Would you have made any veiled suggestion, if he didn't cooperate with you that something might not be good for him?

A. Under no conditions.

Q. You wouldn't have wanted to have weakened his right once having told him it was his to refuse?

A. That is right.

Q. He stated that he did not wish to answer any more questions, that he had answered fully on earlier occasions; that he didn't want to hide anything, but he had answered before.

A. Mr. Kelley, I believe what you are referring to is the fact when I first interviewed Mr. Hollifield—

Q. I don't want you—

The Court: Let him answer the question.

Mr. Kelley: Just answer my question.

The Court: Answer the question in your own way.

A. When I first met Mr. Hollifield on October 6th, I remember very definitely that he was rather belligerent. He didn't want to be interviewed any more. When I met Mr. Svoboda on October 9th, he told me that was just his attitude.

Mr. Kelley: If your Honor please, the witness is going beyond my question of the 6th of October. He is now not answering my question.

The Witness: All right.

Mr. Kelley: I am talking about the 6th.

The Court: He has testified after the 6th of October, at these later interviews, Mr. Svoboda was present, his lawyer was there. I don't think that he has to sit down every time in the presence of a lawyer, who is there representing the man, and say, "Now don't say anything if you do it may be used against you." That is why he has his lawyer there.

Mr. Kelley: May I not conduct my cross-examination? I am laying the foundation on the 6th of October for just one moment.

The Court: Yes, you may, if you get some place with it.

Q. Mr. DeNeale, will you please take out your notes of the 6th of October, the notes which yesterday you didn't think you made any and later you said you remembered. Now take those out.

A. They are clipped to the back of one of these. Here they are.

Q. If you had advised a man of his constitutional rights, that he didn't have to make a statement, and if he said he didn't want to make a statement, would you say he was being belligerent?

A. I have it right here in my notes.

Q. Would you please listen to my question and please answer it?

The Court: You don't need to. It calls for an expression of opinion.

Mr. Richter: We object.

The Court: What difference does it make?

Mr. Kelley: I will make it material.

Q. At the very bottom of the page, read what you put down there?

A. I have a note here at the bottom. I think you are referring to the last note I have. "Hollifield was belligerent and said he had answered the questions he was asked prior. He had nothing to hide. Told I must know more details."

Q. Who told him?

A. I told him and, "I would like to interview him further."

Q. You were pressing after you told him he didn't have to answer any questions?

A. I would say I was pressing for further details.

Q. But because he took your advice of his rights and said he didn't want to talk any more, you claim he is belligerent; is that right?

The Court: That is what you wrote in there, isn't it?

The Witness: That is what I wrote.

The Court: That answers the question.

Q. Now, I believe this morning you indicated to me, as I read off the dates of your interviews, October 6th, 9th, 17th and 22nd, and December 5th, that those were the correct dates. Yesterday, early in your direct examination, counsel for the government, after you testified about going to his home on the 6th, asked you this question: Mr. Richter speaking, "When did you have your next interview?" And you replied, "My next interview was on October 12th." Now, was your memory confused there?

A. That was a pure error.

Q. That was an error?

A. That is right.

Q. So, you didn't have one on the 12th?

A. I was thinking about the October 17th interview.

Q. But you did state the 12th and it was in error?

A. That was a complete error. There was no interview on the 12th to my knowledge.

Q. Mr. DeNeale, I think the inquiry on direct examination then proceeded to the interview of the 9th of October and I believe that you said—the question was put to you as to that meeting—"Did you have any discussion about Mr. Opper?" And you said, "No." That wasn't right, was it?

A. Would you restate that?

Q. I will state it.

The Court: Read it.

(Thereupon the Q. at the top of this page was read by the reporter.)

A. Mr. Kelley, I recall yesterday that I told you that I had reviewed the facts on October 9th that were contained in the signed statement taken by Mr. Clay Pardo. That would include Mr. Opper. His name was in that signed statement.

Q. My question was, when it was put to you, whether you discussed Mr. Opper on the 9th. Didn't you say no, you discussed other persons?

A. I don't believe the record will show that, Mr. Kelley.

Q. I think it will.

A. All right. It may show that with a qualifying statement that I just gave you afterwards.

Q. But the fact is that on the 9th you did discuss Mr. Opper with him, didn't you?

A. We discussed Mr. Opper, yes.

Q. Now, directing your attention, Mr. DeNeale, to the interrogation of Mr. Hollifield, which you conducted on the 22nd day of October, at which time you were present and another gentleman of the F. B. I. was present, Mr. Svoboda, one of Mr. Hollifield's lawyers was present, and Mr. Hollifield, I think you said something yesterday about along in those times you were pretty new on this case and weren't too familiar with it. Would that hold true as of the 22nd of October?

A. To a certain extent it would, the complete facts as far as Mr. Hollifield was concerned, not completely. By this time I had worked this case approximately, considering Saturdays and Sundays and all, about eighteen days.

Q. You appeared as a witness for the government very early in this trial in connection with identifying certain contracts?

A. I did.

Q. At that time, from your testimony, it was apparent in receiving certain documents from the Wright Field you executed certain receipts to the man who gave them to you?

A. I did.

Q. Yesterday, you testified as to the R and R you had shown to Mr. Hollifield, that you had obtained this from someone at Wright Field: is that right?

A. I said I had obtained a portion of these documents from the Office of Special Investigation at Wright Field.

Q. All right. Now, Mr. DeNeale, as I understand your last answer, some of these documents, and I am referring now to Government's Exhibits 25, 26, 27, 28-A and 28-B, and Government's Exhibit 44, which of those documents did you obtain from Wright Field and give a receipt for?

A. Exhibit 44 was this last time. Now is that what you are talking about, Mr. Kelley, just before I took these up?

Q. I am talking about the time that you had exhibits in your hand, either these or first impression carbons thereof, which you had obtained from the Field and presented to Mr. Hollifield, during the course of your interrogation of October 22nd.

A. I wouldn't be able to say for certain one way or the other where I obtained those documents.

Q. Or when? Right?

A. Sometime prior to the 22nd, during my investigation I obtained them.

Q. When you give a receipt for a document, do you retain a copy of that receipt for your own files?

A. Mr. Kelley, I gave no receipts for any of these files during the early part of this investigation.

Q. When did you start using receipts?

A. I gave the receipts to Mr. Kistner, if that is what you are referring to, primarily because the defense, your side had subpoenaed those files. I picked them all up primarily so you people could use them too.

Q. You obtained these documents that you have in your hand which I just described by number, or first impression carbons of them, or some of them, from the Field, without the necessity of giving a receipt?

A. That is correct.

Q. And you didn't make any inventory at the time to show just what you picked up on what particular day and from whom; is that right?

A. That is correct.

Q. Did you always keep what you got, or did you give it back?

A. Let me say that I probably—I recall it was my practice, when I would pick up something to attach a three by five slip on the top of it and write where I had obtained that, so I could give it back when I finished. These things had all been given back.

Q. And your slip be torn up also so you have no record

on which you could state on what date you had gotten any given document?

A. That is right.

Q. Therefore,—

A. On these documents I have to trust to my memory on when and where I received them the first time.

Q. At the time you received these documents, you actually received them about how long before you showed them to Mr. Hollifield?

A. The investigation didn't start until the 4th, as far as I am concerned, of October 1951, and I showed them on October 22nd. Sometime between that time I obtained them from Wright Field.

Q. There was a lot of detail too, what they were and what they related to, that you didn't know at the time?

A. I was new in the procurement end of Wright Field at that time, to a certain extent. I had been working on another case for approximately two or three months dealing with procurements.

Q. So these—

A. I was slightly familiar, not very familiar.

Q. These documents and their significance and the matter to which they relate were not thoroughly understood by you. There was some measure of doubt as to where they fitted in. Is that fair to state?

A. During the early part of my investigation, there was quite a bit of hesitating as to where they fitted in on some of them.

Q. For example, isn't it the fact, even while you were using those documents on the 22nd, passing back and forth to Hollifield and his counsel and yourself, that during all that interview and up to that interview, you weren't even aware that on the back of 28-A was another instrument you hadn't noticed?

A. I was very much aware of that, this was on the back of this.

Q. You were?

A. Right. I had forgotten this up until just recently.

I had forgotten that this was on the back, but this paragraph, this R and R, this comment No. 4 is quoted all through my reports.

Q. What reports?

A. My F. B. I. reports.

Q. Are they quoted anywhere in your notes of that interview?

A. I have to review all my notes here, if you want a definite answer.

Q. Just a moment. You hadn't presented these documents to him until the 22nd, had you?

A. We had—

Q. Had you?

A. Well, I would have to review my notes to be certain of that.

Q. I asked you that very specific question, whether you were sure it was the October 22nd meeting that you handed these documents and you said you were positive?

A. I am positive on October 22nd. Whether I handed them to him prior I wouldn't be certain, because those interviews were mainly confined to other matters.

Q. Your notes of the prior interviews would certainly reflect it, if you showed them to him, wouldn't they?

A. Not necessarily.

Q. But you can't now remember, from your notes or otherwise, whether you did or didn't?

A. From my notes I am certain I showed him these R and R's on October 22nd, because I refer here to the fact we were reviewing R and Rs.

Q. But you don't say which, do you?

A. No, I don't name them specifically, because I had them in my possession. There was no need to make notes.

Q. You acknowledged a few moments ago that you have to rely entirely on your memory, as to what you had in your possession, and your notes do not specifically describe one or the other, they just refer to R and Rs.

A. My notes do not specifically describe these R and Rs.

Q. That is what I understand and that is the fact.

A. Except they relate to D-1 kits and some of my notes show they relate to the D-1 kits which are this group of R and Rs I have in my hand.

Q. Yesterday, in your direct examination, when you were describing the documents that you showed to Mr. Hollifield, on the interview of the 22nd, you included among them the documents which we have just named by number, and in addition thereto you said you showed him what had been marked for identification Defendants' Exhibit G. Now, Mr. DeNeale, I am going to hand you Defendant's Exhibit G and ask you, please, to think well, since it is only your memory that you can recall, are you prepared to testify upon your oath, to a moral certainty, you did have that document on the 22nd of October and showed it to Mr. Hollifield or his lawyer?

A. I am certain I had this R and R, which is Defendants' Exhibit G, at the time that I interviewed him.

The Court: G for identification.

The Witness: For identification only.

Q. All right. And you just saved all these documents in an effort to refresh Mr. Hollifield's recollection, at a time when he evidenced great doubt about what was the fact on any particular, didn't you?

A. He had prior to this indicated that he was doubtful.

Q. In your testimony yesterday, at one point you testified as to the October 22nd meeting, Mr. Hollifield was shown various R and Rs and other memoranda from the files of the Air Force. I ask you to think back to that meeting as carefully as you can and state whether or not these statements were made either by Mr. Hollifield or by you in this language or in language to this effect: "Mr. DeNeale, I show you some R and Rs. Will you read them?" Do you recall telling him that, in substance?

A. Now you are talking about this October 22nd interview?

Q. Exactly, nothing more than that.

A. Now, I certainly wouldn't say myself. You are talking about what I said.

Q. Yes, in substance. Did you hand him R and Rs?

A. I think you just said, "Mr. DeNeale I show you some R and Rs."

Q. If I did, I was mistaken. I am suggesting that you handed R and Rs to Mr. Hollifield and asked him to read them. That is right, isn't it?

A. I showed Mr. Hollifield these R and Rs and asked him to read them, yes.

Q. Then didn't you ask him, after he had read them, whether he recalled anything about these R and Rs?

A. That was the purpose of my interview.

Q. Well, didn't you?

A. To try to enlighten this investigation a little.

Q. Would you try to understand my question and just answer the question? Did you then ask him if he recalled anything about them after he had read them?

A. I must have.

Q. And I ask you now whether or not, in substance, the following statements were not made by Mr. Hollifield and yourself in conversation: "Mr. Hollifield, these R and Rs refer to the D-1 kit. Murray was the project engineer." Mr. DeNeale: Referring to Exhibit, January 25, 1951, 28-A, which parenthetically is 28-A here. Read it again. Mr. Hollifield: Mr. DeNeale I don't recall this R and R at all. I don't remember seeing it before and I believe this is the first time that I have seen it. I see that it does have Murray's name signed to it and he was the project engineer on the D-1 kit. Mr. DeNeale: I see your initials are typed on the R and R. Is it possible that you could have dictated this R and R? Mr. Hollifield: Yes, they are my initials, but I don't remember dictating this memorandum. It is very possible that I did, but I am not sure. Usually we write our own correspondence in longhand and then submit it to the typist. We don't have a stenographer or typist in our unit. The girl was assigned to the branch office but she did all our typing. This D-1 kit has plastic

goggles. Buchsbaum was the contractor. i didn't know Opper was interested in that too. Mr. DeNeale: Do you think that you wrote this R and R? Mr. Hollifield: It is very possible that I could have dictated it, but I really don't know. The phrases and wording are very much the same, but once a person has worked at Wright Field and become acquainted with the correspondence, everyone picks up what you might call a 'Wright Field' style of writing." Reflecting well, Mr. DeNeale, didn't such a conversation or, in substance, such a conversation take place between you that day?

A. I can't answer that very well with a yes or no, Mr. Kelley. I will tell you in substance. It started out—

Q. Just a moment. You say you can't answer. I want to go on a little further first.

A. All right.

Q. I suggest that after some conversation, such as I just read, you directed Mr. Hollifield's attention down into the body of 28-A where the word "E-1" appears. You did that, didn't you?

A. Definitely.

Q. And some conversation thereafter ensued between yourself and Mr. Hollifield, concerning whether E-1 wasn't in error and that it should have read "D-1", wasn't there?

A. It did.

Q. It was clearly understood between you that the memorandum as a whole and its reference matter at the top related only to the D-1 kit, the sun glasses. Right?

A. It was clear that they should have related to the D-1 kit and not E-1.

Q. So it was probable, and was agreed more or less between you, that the E-1 in here was an error, either typographical or of some kind?

A. That is correct.

Q. And there was such a discussion?

A. Do you want me to elaborate on it?

Q. No. I just say, was there?

A. Yes, there was.

Q. Didn't Mr. Hollifield, in connection with that particular discussion last noted, state in substance that he probably could have dictated that R and R and inadvertently used the term "E-1" kit, since that was his project and he was very accustomed to using "E-1"? He did state that as a possibility?

A. The "E-1" in there is what convinced Mr. Hollifield that he had dictated that R and R.

Q. Now I ask you if, in substance, this conversation didn't take place between you and Mr. Hollifield, on October 22nd: "Mr. Hollifield: I am not positive that I wrote this R and R that is Exhibit 28, but let us say that it is possible I may have had something to do with its preparation. Murray signed the R and R and if I had prepared it, I would have signed my name to it. Mr. DeNeale: I thought that Opper's dealings were only with the ski goggles as to whether they were Type 1 or Type 2." Now I ask you, Mr. DeNeale, wasn't that conversation, in substance, had that day?

A. Mr. Hollifield was just doubtful as to whether he dealt with Mr. Opper on any other type of goggles other than the ski goggles at first. Later he was convinced he had dealt with the plastic goggles, with the D-1 kit.

Q. Later in the conference he was convinced?

A. Later in the interview.

Q. You convinced him?

A. You might say to a certain extent that I pointed out the facts and this led him to recall certain facts and he convinced himself.

Q. Isn't it fair, Mr. DeNeale, to say that throughout you were undertaking to convince him and to have him admit that he wrote it?

A. I wasn't undertaking to have him admit anything. That is definitely not my job. I was undertaking to weed out the chaff in this investigation.

Q. Mr. DeNeale, didn't you point out from time to time that he must have seen it because his initials were there and the E-1? Didn't you urge that conclusion on him?

A. I will say that I pointed out to Mr. Hollifield the fact that his initials were on this R and R. I pointed out the fact to Mr. Hollifield that he was the project officer on the E-1 kit and that it would be very likely for him to make such an error and put in "E-1 kit." Yes, I pointed out those facts.

Q. Didn't he argue the other way by saying, "Murray signed the R and R and if I had prepared it, I would have signed it."? Didn't he contest the other way and state he didn't remember, that it was a possibility, and say he didn't remember whether he had signed it or prepared it? Isn't that true?

A. No, it isn't true. Mr. Murray was definitely the project officer on that. I don't think it ever dawned on me that it was necessary for Mr. Hollifield to sign such an R and R.

Q. I didn't ask what dawned on you. I asked, Mr. DeNeale, isn't it true that on that conference when you were pointing out to him his initials and other things of suggestion, that he did write it, he continued to reiterate his doubt he wrote it and gave reasons such as he didn't sign it and that the wording didn't seem to be proper? Isn't that the truth?

The Court: Answer yes or no.

The Witness: You can't answer such a thing yes or no.

A. The purpose of my asking him about this R and R was to find out who had written it. That was my main purpose. Mr. Hollifield at first definitely was hazy. He didn't even recall he was dealing with a plastic goggle, and later on, after our inquiries on it, seeing the fact that there was an error made in that R and R of "E-1 kit", he was convinced that he had written that R and R, at least dictated it.

Q. Who convinced him?

A. Through my pointing out facts to him, maybe you might say that I convinced him.

Q. Isn't it true that throughout this conversation, you pointed out facts, he continued to express doubt and finally, after that had gone on and on, he said, not that "I did it", but "I must have done it"? Yes, look in your notes, because that is just what they say.

A. That is what I want to see, exactly what my notes call for.

Q. I will find it for you.

A. Were they in these notes?

Q. Yes, sir. Reading from the second page of your notes.

A. (Reads) Memorandums on goggles all read by Hollifield. Felt that went to Visual Unit. Moss and Strand with Opper on goggles going in E-1 kit—glass, but must have been plastic on D-1 kit after viewing R and Rs."

Q. Stop there a moment. So, after reviewing the R and Rs, he said it must have been the plastic or the sun glass?

A. That he went to the Visual Unit where he saw Mr. Moss and Mr. Strand, with Opper. It must have been the D-1 kit.

Q. In that meeting, didn't Mr. Hollifield keep telling you, "Yes, I went with Mr. Opper once to the Vision Lab. Mr. Opper was there, I was there and Mr. Strand was there and Mr. Moss was there. But, Mr. DeNeale, that wasn't on the sun glasses as to these talks; that was on the ski goggle." Didn't he keep telling you that?

A. At first he thought his only dealings were on ski goggles. He didn't feel he had dealt at all on plastic goggles, yes.

Q. Get to my question. Didn't he state that he had only gone once with Mr. Opper and he believed it was in connection with the ski goggle, on the E-1 kit? Didn't he say that?

A. At the start of the interview, definitely.

Q. And thus it was in connection with that fact he said, after discussion and reviewing R and Rs that were put to him, it must have been the plastic goggle. You convinced him, didn't you.

A. It must have been the plastic goggle that he had a conference with Strand, Moss and Opper on.

Q. And in your efforts to convince him, when he was in doubt, that it must have been on the sun glass, in the D-1 kit, that he went with Mr. Opper to the lab. The point that you were persuading him was the fact, you undertook to refresh his memory and to convince him by showing him this, which is 28-A, which clearly does refer to sun goggles and D-1, and it refers to a meeting in the lab. between Moss, Strand, Hollifield and Murray. When he looked at that he said it must then have been about the D-1. Isn't that true?

A. Yes. After reviewing these R and Rs, he said it must have been.

Q. But, sir, in order to give him a fair chance at refreshment, as to whether it was the D-1 in the lab. or the E-1, did you also hand him at the same time Defendants' Exhibit G?

Mr. Aug: That is for identification.

Q. (Continued) For identification. Did you take and hand him both Defendants' G and Plaintiff's 28?

A. Let's see it.

Q. And say, "Now look at both and see whether it was on the E-1 or the D-1"?

A. Let's see them. Mr. Hollifield could never tell me how this R and R came into being.

Q. What are you talking about?

A. This Defendants' Exhibit G for identification. He wasn't certain. He told me that it probably came down through the lab. as a result of his authorities in having the goggles approved. He wasn't sure what happened.

Q. This is an R and R from the Vision Laboratory, isn't it?

A. It is a Vision Lab. form, evidently dictated by Fred Moss, Vision Laboratory, yes, attention Mr. Hollifield.

Q. Yes. It has got Moss, Strand and Heim on it.

A. That is correct.

Q. And it relates to the ski goggle, doesn't it?

A. The specification is in relation to ski goggle.

Mr. Aug: If the court please, this exhibit is not yet evidence.

The Court: That is correct. It is not in evidence.

Mr. Kelley: I understand it is not in evidence.

The Court: No, it is not in evidence.

Q. This relates to the ski goggle, does it not?

The Court: Do you object?

Mr. Aug: Yes, your Honor.

The Court: I will sustain the objection. That is not evidence in the case at this time. You cannot cross examine about it.

Mr. Kelley: Of course, my dilemma is, it is government's case and the defense can't put in evidence at this time.

Mr. Aug: You can start on Monday.

Mr. Kelley: Let me finish without interruption, please. The witness, of course, has testified that this was one of the documents he used. He testified that on direct and this is on cross.

The Court: He testified that the document marked as Defendants' Exhibit G was used by him, yes, sir, but he didn't tell us anything that was on it and I said: "Leave those down. Don't do anything but just give us the number." And that is all he did.

Mr. Kelley: Well, in that case, I will have to come back to it later, bring this witness back. He will have to answer the question when it is in evidence. I can't offer it in evidence now and the government apparently doesn't want to offer it for some reason or other.

Mr. Aug: I think we are entitled to present our case as we desire.

Mr. Kelley: Of course.

Q. You did have in your possession, as you have testified, not only 28-A that you handed to Mr. Hollifield, but you have testified on direct examination that you handed him other R and Rs, among which was an R and R from the Vision Lab. which approved ski goggles, didn't you?

A. That is that Defendants' Exhibit G.

Q. A few moments ago you said to a moral certainty under oath you gave it to him.

A. This is the wrong one. I showed Mr. Hollifield Defendants' Exhibit G to the best of my memory. I have nothing to back it up in the line of notes or anything, but I am certain I showed him Defendants' Exhibit G.

Q. Isn't it possible that you never discussed that or knew of its existence until you talked with Strand and Moss, at a later time, and got that later in your investigation?

A. No, definitely not.

Q. But you had then documents, if you had it there, you had documents that indicated that the Vision Lab. had testified both the ski goggle on the E-1 kit and the sun goggle on the D-1 kit. Correct?

A. I had documents and I was so told by Strand and Moss that they had tested the two types of goggles, yes.

Q. And you had the results there, first the result on the ski goggle from the lab., the other a test on the sun goggle, a lab. report. Right?

A. At this time, I had these R and Rs, the testimony, or the results of my interview from Fred Moss and Captain Strand.

Q. I am talking about documents you used to refresh. You had a document. I am talking about October 22nd. Didn't you have one document that constituted approval by Vision Laboratory, Moss and Strand, of the ski goggle?

A. Yes, I did.

Q. Then look at 28-A. That refers to the sun goggle, also, the Vision Lab. test, doesn't it?

A. Yes.

Q. Now then, I have asked you before and I ask again, during this conference, didn't Mr. Hollifield repeatedly say in these—words to this effect: "Mr. DeNeale, I went to the lab. once. Mr. Opper was with me. There were four people there, myself, Mr. Opper, Mr. Strand and Mr. Moss. But Mr. DeNeale, believe me, that was not on the sun goggle, that was on the ski goggle." And did you not then in an effort to convince him that the visit of Mr. Opper and himself was in connection with the January 25th memorandum, hand it to him and say, "Doesn't that refresh you?" And failed to hand him the other one, concerning the test of the ski goggle, which might have given him a different refreshment of recollection?

A. Mr. Kelley, I will answer that this way: I haven't all the exhibits, if you want me to refer to them by exhibits here.

Q. (Counsel hands exhibits to the witness.)

A. Now, there are some more exhibits on the ski goggle. I would like to have those.

Q. Now what have you got? Let's see what you have. Have you Government's 44?

A. Yes.

Q. Do you have Government's 25?

A. Yes.

Q. Do you have Government's 26?

A. Yes.

Q. Do you have Government's 27?

A. Yes.

Q. Do you have Government's 28-A and 28-B?

A. Yes.

Q. And do you have Defendants' Exhibit G?

A. Yes.

Q. Those are all documents that you said yesterday you had and showed to him. Now what other documents are you talking about?

A. There is one more that I had yesterday that I don't have right now and that is a letter of November 10, 1950, written by the Cappel-MacDonald Company to Mr. Hollifield.

Mr. Kelley: I wonder if the court reporter would go back and read my last question. It is rather long.

(Thereupon the third Q. on page 249 was read by the reporter.)

Q. Now you have the exhibit, Witness, what is your answer?

A. Mr. Hollifield was shown Plaintiff's Exhibit No. 31 in evidence. He was asked whether Plaintiff's Exhibit No. 44 was not his approval and in answer to Plaintiff's Exhibit 31. He told me yes, it was his—it reflected—that this was his opportunity in approving the ski mountain goggles which were to be sold by Mr. Opper to a prime contractor, to be used by the Air Force. It was as a result of his agreement that this exhibit was written.

Q. Now let us get that just for sure.

A. That is a ski mountain goggle there.

Q. Now, you tell us now that you took out Exhibit 31 and Exhibit 44 and handed them to Mr. Hollifield and you tell this Jury that he said: "Yes. Exhibit 44 represents my approval which I obtained and gave in consideration of the money I was to receive under an agreement with Mr. Opper." Is that your testimony?

A. He said that that reflected his efforts in getting the goggles approved.

Q. You added "Under the agreement"?

A. He added it was o. k. under the agreement.

Q. You went on and added "In consideration for money he was to receive." Didn't you add that a few minutes ago?

A. Yes.

Q. Wasn't it put in question form by you rather than volunteered? Didn't you say: "Mr. Hollifield, do these not represent your approval in consideration of the agreement with Mr. Opper"? Didn't you put it in the form of a question?

A. I probably definitely did.

Mr. Kelley: I think you did. Now we must stop here, for a moment. Could we have a five-minute recess?

The Court: All right. Take a little recess, Members of the Jury.

Thereupon a short recess was had.

Mr. Kelley: May I proceed, your Honor?

The Court: Counsel may proceed.

Q. Mr. DeNeale, just prior to the recess, I believe in substance you testified that you handed Mr. Hollifield two documents, one of them being Government's Exhibit 31 and the other one being Government's Exhibit 44, and that it was you who framed the question and he gave the answer to the effect that those two documents represented his effort in having goggles of Mr. Opper's approved in accordance with the agreement he had with Mr. Opper to do so for money. Is that about it?

A. On at least one occasion I definitely framed a question like that, I am sure.

Mr. Kelley: These two exhibits are in evidence. May I pass them to the jury. I would like to have them see them physically and note particularly the dates on each.

The Court: Certainly.

(Thereupon Government's Exhibits Nos. 31 and 44 were passed to the jury.)

Q. Now, Mr. DeNeale, since as you have testified that you put the question to Mr. Hollifield and asked him if it wasn't a fact that his preparation of this memorandum, Government's Exhibit 44, was not, so to speak, services rendered on behalf of the consideration expressed in an agreement with Mr. Opper for $1750, this instrument was dated on the 22nd of November 1950, now let's see what the evidence says as to when that agreement took place. According to your notes, when you first went to interview him you had in your possession copies of written statements that he had given to the F. B. I. and O. S. I., on September 26th, 1951, before you had interviewed him. Isn't that right?

A. During the time of the interview of Mr. Hollifield on October 22nd, I had those in my possession, or copies of them, one or the other.

Q. I show you what has been marked Plaintiff's Exhibit 38. Referring to the third page thereon, you follow me as I read: "Around the early part of 1951, William J. Opper came to my office about some ski goggles he was interested in selling to the government. Opper said some of the goggles he had met the procurement requirements and others did not but he could not tell them apart from visual inspection. In the supply room near my office, Opper said to me something like, 'If you can use them I can make it interesting for you'." Government's Exhibit 37, purporting to be a statement given by Mr. Hollifield to the F. B. I. I have them in reverse. The one I first read was to the F. B. I. Is that correct?

A. That is right.

Q. And this one was to the O. S. I. on the same date?

A. That is right.

Q. The date is the 26th of September 1951 and I read: "Approximately nine months ago"—Approximately nine months from the 26th of September 1951 would be what date?

A. First of the year.

Q. Be in January, January 26, 1951, approximately, wouldn't it?

A. That is correct.

Q. (Reads) "Approximately nine months ago Mr. Opper called at my office in the Aero Medical Laboratory and offered to pay me the sum of $1750 provided I would submit his surplus goggles to the Vision Unit." Now, you had read copies of these statements, when you undertook to interrogate him on the 22nd, didn't you?

A. I had previously read copies of the F. B. I. statement, yes.

Q. Isn't it a true fact, Mr. DeNeale, that during the course of your interrogation of Mr. Hollifield, on the 22nd, you endeavored to have him fix a date of that agreement with Mr. Opper, at as early a date as possible?

A. I endeavored to have him fix the correct date, as near as possible.

Q. It suited your purpose to make it as early as possible, didn't it?

A. No. It wouldn't suit my purpose one way or the other.

Q. What did he tell you in that respect?

A. On October 22nd he told me he first met Mr. Opper in November or December of 1950.

Q. May I pause? That means he first met him, made his acquaintance, first met him November or December?

A. Of 1950.

Q. Then he told you, did he not, at a meeting later than that, Mr. Opper made him a proposal involving money, didn't he?

A. Yes, a few days later.

Q. And he fixed that on the border line of November, December, and it was after that he said the agreement was reached?

A. Yes. He couldn't put any definite dates.

Q. Do you have your notes there now? See the ones of October 6th first.

A. Here are the 6th.

Q. And the 9th, please.

A. (Witness produces notes of the 9th.)

Q. And the next one which would be the—

A. The 17th probably. (Produces.)

Q. Now, there are some things in the course of your interview with Mr. Hollifield on October 22, 1951, that you haven't mentioned at all in your testimony; isn't that true?

A. There are probably some things. I can't recall right now what it would be.

Q. To refresh your recollection, didn't Mr. Hollifield, in the course of that interview, say to you, "The goggles are satisfactory whether Type 1 or 2, as both are good goggles"?

A. That is correct. Mr. Hollifield had noted that.

Q. Please answer my question. Did he say that or didn't he?

A. Yes. He said the goggles are satisfactory whether Type 1 or 2, as both are good goggles.

Q. Didn't he also say, "Went to Visual Unit and saw Oliver Strand and Fred Moss with Opper"?

A. My notes show "Went to Visual Unit and saw Oliver Strand, Fred Moss with Opper."

Q. Didn't you write four names and only four names, Moss, Strand, Opper and Hollifield?

A. I did.

Q. Also didn't you make the note, read with me, "Does not recall glasses being rejected, but recalls conference as in R and Rs. Only in Strand's office once with Opper. Must have been on D-1 kit being made by S. Buchsbaum & Company".

A. That is right.

Q. And in reaching the conclusion, it must have been, you had theretofore refreshed him by showing the memorandum, Government's Exhibit 28-A?

A. That is reflected above there.

Q. Yes. Now, as to matters not yet mentioned, didn't you make this note: "Opper wanted to be sure his goggles were all right to sell to any prime contractor. This was all Opper wanted out of him, Hollifield."

A. I did.

Q. Didn't you write, "Thought they were ski, mountain type goggles in conference"?

A. I did.

Q. Didn't you write, "Thought he was accepting his, Opper's goggle, but felt that they were satisfactory for use and not harm kit in any way. Government had packed kit and O. K. with stock items which felt were same."

A. I did.

Q. Didn't you also write, "From viewing R and R feels first time Opper came in with goggles for test was about first of December, 1950 or just before this, not sure."

A. I did.

Q. "Made approach at time or soon after." Right?

A. I did.

Q. Did he not state, "Feels helped Opper out in getting goggles approved and done for that purpose, but if he had never agreed to pay would probably have done same thing. No kit is ever assembled without deviations from specs."?

A. That is right, yes.

Mr. Kelley: That is all.

Redirect Examination, by Mr. Aug.

Q. Mr. Svoboda was present all during this interview of October 22nd. Is that right?

A. He was, sir.

Q. He was present when you questioned Hollifield concerning R and Rs?

A. Yes, sir.

Q. He was present when Hollifield concluded Exhibit 31—

Mr. Kelley: In the first place, this is a suggestive question. He has already established he was present at all times. Therefore, he would be present at any time anything went on. He has established that Mr. Svoboda was present at all times. Therefore, he wants to say he was present when this happened or that happened.

The Court: it is all right. You don't object to him asking about a specific time.

Q. He was present when Hollifield concluded that Exhibit 31, which is the Cappel-MacDonald letter of November 10, 1950, was shown to him; he was there when Exhibit 44, which was the November 22nd memorandum was shown to him and he was there when Hollifield, after looking at those two exhibits concluded that those were his efforts in approving the ski goggles. Is that correct?

A. He was.

Q. And Mr. Svoboda was present when you showed Mr. Hollifield the R and Rs which are Government's Exhibits 25, 26, 27 and 28; is that correct?

A. He was.

Q. And he was there after all of the examination of ese R and Rs, when Hollifield concluded that this repre-nted his efforts with respect to the approval of the lastic goggle; is that right?

Mr. Kelley: I object to these questions. He has estab-shed he was there during all of these conferences. Now ll counsel is doing is undertaking to sum up to this jury ght now.

The Court: Go ahead. Overruled.

Q. Have you answered the question?
A. I hadn't answered it, but he was present.
Q. Was he present when Hollifield made the statement e had done these things for Opper in consideration of his greement with Opper to pay the money?
A. He was there, sir.

Mr. Aug: No further questions.

Recross-Examination, by Mr. Kelley.

Q. Of course, he was there all the time, wasn't he?
A. He was on every occasion that I interviewed Mr. Hollifield.

The Court: He wasn't there on the 6th of October.

The Witness: No, he wasn't there on the 6th of October.

The Court: Don't say he was there all the time. He vasn't there the first time he went out to his house.

The Witness: No.

Q. On the meeting of October 22nd he was there when ll the things took place that you discussed with me about his morning, on cross-examination, wasn't he?
A. He was present during the entire interview on—
Q. During that interview, was a conversation had be-ween you and Mr. Hollifield, in substance, such as this: "Mr. Hollifield: Mr. DeNeale, I thought all the time that he difference"—

Mr. Aug: Who is saying this, Mr. Kelley?

Mr. Kelley: Mr. Hollifield is speaking.

Q. Mr. Hollifield speaks: "Mr. DeNeale, I thought all the time that the difference in the type of ski goggle that Opper was selling to the contractor was the question here, but now it looks like the plastic goggle was also in question. I am quite sure that I went with Opper to the Vision Unit with reference to the ski goggle. I called Moss and Strand and Opper and myself went right over. As I recall, we discussed the type 1 and type 2 ski goggle, and I believe that I asked that a lab. test be made. By the way, Mr. DeNeale, I know that these plastic goggles and the ski goggles were both approved by the Vision Unit. Didn't you get the R and Rs showing that they were approved? Those R and Rs must be around there some place, Mr. DeNeale. I know that my approval wouldn't have been given if I hadn't received some memorandum that they were o. k." Now, didn't that conversation, in substance, take place in the presence of yourself, in the presence of Mr. Svoboda, Mr. Hollifield and another agent of the F. B. I.?

A. Part of that is correct. Part of it is not.

Q. What is not correct?

A. You would have to read it over. I forget just the portions.

Mr. Kelley: At the moment, you can't remember what was incorrect. That is all.

Mr. Aug: That is all. We are through with the witness, your Honor.

The Court: Is that all?

Mr. Aug: That is all.

The Court: Now, members of the Jury, it is practically the adjournment time—recess time for lunch. We will now recess the further hearing of this case until 2 o'clock this afternoon.

Mr. Aug: May we interrupt to approach the Bench?

The Court: No, sir. Please sit down. I am instructing the jury.

During this interval, you bear in mind my usual admonition. Return, if you please, at 2 o'clock this afternoon.

Now, after the jury leaves, counsel may address the Court. I will wait for you, but the jury in the meantime may go ahead and be excused and get their lunch and be back at 2 o'clock.

Thereupon the jury retired from the court room and the following proceedings were had in the absence of the jury:

The Court: Tell me what it is you want to tell me.

Mr. Aug: I would like to call the attention of the Court to the fact the government at this stage of the proceedings does not intend to put on any further witnesses. It would be our request of the Court that we adjourn the hearing of this case until Monday morning, so that we will have the opportunity over the week-end to consider our case, to see whether there are any other matters we think we should put on, and in the event there are none at that time, if the Court please, we would rest. If in the interim we have decided that we may have missed something here or there, we would like an opportunity to put it on. At this stage of the game, we do not wish to present any further testimony.

The Court: Defendants may be ready to proceed at 11 o'clock, on Monday morning, as far as you know now?

Mr. Aug: Yes, your Honor.

The Court: When the jury comes back and we adjourn—We agreed the other day—You thought you would be through yesterday—whatever the time was that the government was through, it is agreed we would adjourn until Monday morning. That appears in the record.

Mr. Aug: That is correct, your Honor.

The Court: Now, the defendants are notified, as far as you know they may proceed on Monday morning.

Mr. Canny: If they are resting, we want to prepare some motions and file some memorandums. If we don't know whether they are going to close until Monday, we can't be in position to file those motions or memorandums.

The Court: We will take the time.

Mr. Kelley: I would like to determine if your Honor would be willing to accept any legal memorandum that we might make available to him over the week-end, that would bear upon the motions, which inevitably we will file. Of course, we will furnish copies to the government. It might give your Honor some more leisurely opportunity to consider the law we will want.

The Court: Certainly, Gentlemen.

Mr. Kelley: In that case, we thought we would remain here and work tonight and tomorrow on a memorandum and if we could give it to your Honor late Saturday, that is about as soon as we could get it in shape.

Mr. Aug: At this stage of the case we are through. In order that we haven't the question before us as to whether we have the right to re-open or not, we too would like some opportunity to reconsider our case and determine between now and Monday whether we wish to put on some additional testimony. It is our best opinion at this stage of the game, on Monday we will rest. We will this afternoon have no further testimony to present to this jury.

The Court: I understand that. I have no objection to counsel preparing this memorandum. It looks a little bit, Gentlemen, like you are going to ask me to violate the Sabbath.

Mr. Kelley: I am afraid that is the conclusion from what I said.

The Court: I think you better wait until Monday morning.

Mr. Kelley: I wouldn't want your Honor to work on the Sabbath and that is what I would force you to do.

The Court: It wouldn't be the first time and maybe not always in such a good cause. It keeps you here working all the time. You may have until Monday morning. I will give you plenty of opportunity to present any motions you wish and your memoranda and arguments on both sides. I presume the government has no motions, but I will hear from both sides. The main thing is be prepared with your witnesses, because Mr. Kelley, you will recall you said you didn't want your witnesses to have to come over here and sit around as they would have done.

Mr. Kelley: We have our subpoenaes out.

The Court: See they are here Monday morning.

Mr. Kelley: We have our srbpoenaes out anticipating their being here Monday morning.

The Court: So far as I know, the government expects to rest, but they may find some exhibit they didn't offer or some little thing, and they will have the opportunity to do that. But so far as I know now, we will adjourn now and after the jury comes back at 2 o'clock, we will adjourn until Monday morning, and you bring your memoranda with you on Monday morning.

We will adjourn court now until 2 o'clock this afternoon.

Thereupon the further proceedings in the trial of this cause were adjourned until 2 o'clock of the afternoon of the same day.

Afternoon Session.

Friday, May 23, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

The Court: Counsel wish to be heard further?

Mr. Aug: Your honor, during the noon recess, I have discussed this case with my associates and it is our decision that we will present no further testimony in this case and at this stage of the proceedings I would like to state that the goverament rests its case.

The Court: Now, Members of the Jury, earlier in the week, not knowing how long we might require for the government to present this testimony, it was agreed by counsel—suggested by counsel and agreed to by the Court, that whenever the time came, if it did come this week, that the government rested its case, then we would adjourn the case over until Monday morning of next week, which would be May 26th, at 11 o'clock. So, I am about to excuse you, Members of the Jury, in accordance with that arrangement and you need not return until 11 o'clock on the morning of—Monday morning of next week, May 26th.

Now, Members of the Jury, I have admonished you or cautioned you each time we have adjourned and particularly I did so on the—when we first started the case and told you that followed throughout the case. Now the government having rested, we will start in on the defendants' side of the case on next Monday. During this interval, while it is always important, very important,—I do not mean to detract from anything I have said. During this interval I wish to impress upon you very much not to talk about the case to anybody; do not permit anybody to talk to you about the case. If anybody attempts to talk to you about it, you advise the Court of that fact at once. Now, do not make up your minds, Members of the Jury, because you haven't yet heard all the testimony in the case and counsel are entitled to argue the case and then after that I will charge you the law as applicable to the case, as I understand it to be. So keep your minds free and open until you have heard all the case and it has been finally submitted to you. Did you wish to say something?

Mr. Marker (Juror No. 6): Yes, sir. Your Honor, you said when we came here it was our patriotic duty to serve on the jury. I try to do that duty as good as I can and I am a small town funeral director and I have a funeral Monday and I know what you say—

The Court: What time is it on Monday?

Mr. Marker: It is Monday afternoon sometime. It hasn't been definitely set. I will come if you say so.

The Court: I cannot excuse anybody off of this jury. I thought I made that as impressive as is possible for anybody to make it at the beginning of this trial and I informed you that this lady and gentleman here who are the alternate jurors are not here as just supplies or as they call them on a baseball team, a substitute. They have a legal status too. This is a criminal case and I can't excuse you now.

Will counsel come here just a minute on both sides? Just be seated a second.

(Court and counsel confer out of the hearing of the jury.)

The Court: Now, Members of the Jury, I want to impress on you again, of course, in matters of this kind the Court just can't excuse everyone. You understand that. I mean, we all have undertaken an obligation here and, of course, there are certain principles of law that are fixed and established. If we don't go by them, why then we all get in trouble. However I have talked to counsel and some of our counsel, as you know,—all of them I guess, except Mr. Canny, Mr. Meyring and Mr. Svoboda, but the rest of the gentlemen are all from out of the city. They suggest that I excuse the jury until Tuesday morning. That will let you have an opportunity—Don't anybody else die over in that community until we get through with this case anyhow, for goodness sake. They can help us out that much. I will excuse you until Tuesday morning, and that will accommodate our juror, and counsel

seem to feel that perhaps it would be best all around because they are away from home all the time; they only have the weekend to work in. As far as I am concerned, why, when we get through with this case, I have to try another one, so it doesn't make any difference to me one way or the other. Since counsel all agree to it, I will excuse you until Tuesday morning, that is, May 27th, Tuesday morning, at 11 o'clock. You may now retire. Bear in mind my admonition and return here, if you please, at 11 o'clock on Tuesday morning. If counsel will just wait a minute, the jury can be excused first.

Mr. Marker (Juror No. 6): I want to thank you, Judge.

The Court: That is all right.

Mr. Marker: And the attorneys.

The Court: Keep everybody well now over there until we get through.

And thereupon the jury retired from the court room.

The Court: Now, Gentlemen, the reason I thought I better excuse the jury first is because I am going to adjourn court until 1 o'clock on Monday. I was afraid we would get them confused about the matter so I thought we better do that in their absence. So we will adjourn court until 1 o'clock Monday afternoon, at which time we will take up whatever matters counsel wish to present at that time, then the jury will be back on Tuesday.

Adjourn court until Monday afternoon of next week at 1 o'clock.

Thereupon court was adjourned until Monday afternoon at 1 o'clock.

Afternoon Session.

Monday, May 26, 1952.

Court met pursuant to adjournment. The jury being absent and counsel being present as heretofore noted, the following proceedings were had:

The Court: Are counsel ready to proceed?

Mr. Kelley: Yes, your Honor. May it please the Court, on behalf of the defendant Opper I should like at this time to present to the Court a motion for the dismissal of the indictment as to the defendant Opper and a motion in the alternative for a judgment of acquittal as to the defendant William J. Opper. Following the motion we have attached a memorandum in support thereof.

We have endeavored within the brief time available over the week end to index this brief as thoroughly as time would permit and we have also undertaken by way of appendix to set forth the statutes involved and to set forth a chart, so to speak, which will permit a comparison between the evidence which may be considered as against the defendant Opper and the evidence which may not be considered as against the defendant Opper, the difference lying in the introduction of evidence of confessions or inculpatory statements on the part of Hollifield which, as your Honor has charged the jury, none of which are admissible as against Mr. Opper.

In addition thereto, in the appendix, we have undertaken to list completely the government witnesses chronologically as respects their order of appearance on the stand. We have also undertaken in the appendix to set forth a complete list of the government exhibits, with a brief description of their nature chronologically as respects the order of their introduction, and I will hand up a copy of the motion and memorandum to your Honor.

The Court: Thank you.

Mr. Kelley: Will it be necessary to have the motion marked filed in handing it up this way?

The Court: I don't think it would do any harm, and then it is on the record here.

Mr. Kelley: Should I disattach it?

The Court: No, just leave that on. Miss Boyd, just take this over and stamp the first page, that is the motion.

The rest of this is a memorandum in support of it. Don't mark that filed, just the motion now. Of course, it appears in here. At the same time it doesn't do any harm to have it on the docket too.

Mr. Meyring: If your Honor please, we also have two motions. Perhaps the lady will take them along with her and have them stamped too. There is a motion to strike and a motion for dismissal of the indictment as to the defendant Hollifield, or a motion in the alternative for a judgment of acquittal. Shall I give these to her to take with her?

The Court: May I look at them? I thought you said a motion to strike.

Mr. Meyring: A motion to strike.

Mr. Kelley: I have one which I intended to take up later.

The Court: Let's go through with Mr. Kelley's then. Now also there is a motion for Mr. Opper to strike. All right. Let's see that, Mr. Kelley, if you please. (Mr. Kelley hands motion to the Court.) Let's have them filed. Now, Miss Boyd, file these. Are there any more?

Mr. Kelley: That is all, as far as we are concerned.

Mr. Meyring: That is all.

The Court: Now, Gentlemen, in your motion to dismiss or in the alternative,—I say Gentlemen. I am referring now to Mr. Meyring and Mr. Svoboda. —are you relying on the memorandum brief that has been filed by counsel for Mr. Opper, or do you wish to file one?

Mr. Meyring: There is one joint brief that we will file with reference to it.

Mr. Kelley: I think I may clear this up. It had been my purpose to first argue defendant Opper's motion to dismiss or in the alternative motion for acquittal. Just recently I completed the dictation of another memoran-

dum in support of the motions to strike. That is a joint memorandum as to both motions to strike. It should be here in a matter of five minutes and then we will hand it up.

The Court: That is quite all right.

Mr. Kelley: There will be a joint motion filed in support of the motion to strike as to Opper and the motion on the part of Hollifield.

The Court: You mean a joint memorandum.

Mr. Kelley: Joint memorandum I meant to say. There will be separate memoranda in connection with the motion to dismiss attached to,—as I understand it, the defendant Hollifield's motion to dismiss is a memorandum which in part incorporates certain portions of the defendant Opper's memorandum.

The Court: I didn't see that.

Mr. Meyring: It is attached, your Honor, to the motion.

The Court: Wait just a second, until Miss Boyd brings these back.

Mr. Meyring: I have copies, if you want to see those.

The Court: No. Is this the original?

Mr. Meyring: Yes, the original is filed.

The Court: She will bring them in in a little bit.

Mr. Meyring: All right.

The Court: Now would you like to proceed? Would you like to proceed to present the motion to dismiss or in the alternative filed on behalf of the defendant Opper?

Mr. Kelley: Yes, your Honor. As your Honor will observe, this motion is—the memorandum in support of this motion is more extensive. It has not been our purpose to be verbose but we did feel that the circumstances justified

the fullest treatment in the interests of the defendant whom we represent.

The Court: I don't want to interrupt you. I would suggest, if you don't mind, suppose you now read the motion so we get it in our record, as well as having it filed over there.

Mr. Richter: Pardon me. If the Court please, may we indicate how much time each side is going to use?

The Court: Well, how much would you like, you Gentlemen?

Mr. Kelley: As to the motion to dismiss, I do not wish to argue more than fifteen minutes.

The Court: Very well. And you Gentlemen, I mean Mr. Meyring and Mr. Svoboda?

Mr. Meyring: About the same time, your Honor.

The Court: We will say thirty minutes on that one. That is all right. Now then on the motion to strike.

Mr. Kelley: May I go back to that other point a moment, your Honor? My thought in arguing this extensive motion for only fifteen minutes was predicated on the assumption that since the jury is not here today that your Honor will have time to read our memorandum in full.

The Court: I will take the time, you may be sure of that.

Mr. Kelley: That being true, I see no reason to usurp more of your time by repetition, but I would like and can in that fifteen minutes to describe the highlights of the outline of this brief.

The Court: That is quite all right. And you the same time, Mr. Meyring?

Mr. Meyring: Yes, sir.

The Court: Then we will say thirty minutes. How long do you want on behalf of the government?

Mr. Richter: Thirty minutes at the most and probably considerably less.

The Court: I will give the defendants an opportunity for fifteen minutes, if they wish to make some little response.

Mr. Kelley: As to the second motion I would say the same amount of time would be ample.

The Court: Yes, that is all right.

Mr. Richter: All right.

Mr. Kelley: I should like, your Honor, to read into the record the following motion filed on behalf of the defendant William J. Opper:

"Comes now the defendant William J. Opper at the close of the government's evidence and moves the Court to dismiss the indictment in the above entitled cause as to the defendant William J. Opper, or in the alternative moves the Court to enter a judgment of acquittal as to the defendant William J. Opper in the above entitled case."

The memorandum which we have filed in support of this motion consists first of a preliminary statement and involves four major points of argument, some of which are highlighted by subpoints, so to speak. As a preliminary to consideration of this motion it should be observed, although the Court, I am sure, is most well aware of it, that much of the evidence received in this case is concededly competent as to one defendant and wholly incompetent as to the other. During the course of the trial your Honor has charged the jurors with respect to the distinctions which they must make in this connection. And surely neither of the defendants has any right to complain, indeed they have every reason to be grateful to the Court because of the frequent and forceful and the

lucid manner in which the Court has admonished the jury in this connection.

The human mind is often not equal to the task involved in sorting out a profusion of facts and impressions once they have been mysteriously stored away in the memory, nor is the human intellect likely to surmount the more difficult task of eclipsing the memory of one fact while endeavoring to retain the recollection of another, both facts having been originally impressed upon the mind at the same time by an indivisible circumstance.

We find such a situation as far as the defendants view it where under the law and with propriety the Court has required two defendants to stand trial jointly and where in the course of that trial inculpatory statements of one are admitted as against him under admonitions of the Court that they should not be considered against the other and vice versa. That is a predicament, a situation which historically many courts have said is unfortunate. The fine point of discretion as to when a severance for such reasons should be granted and when not is, as I say, a weighty one, but it is moot here because it has been decided. I mention these factors only as a prelude to this observation.

It is of the utmost importance to the defendant Opper in the interests of justice and to the end that he be afforded all of the rights guaranteed to him under the law that your Honor, the trial judge in this cause, who by special training and long experience possesses a wisdom far transcending that of the average juror as respects the law and as respects an ability to segregate and consider dispassionately item of evidence.

It is thus that we seek a review at your hands, a review of the evidence which with your Honor's perspicacity will permit you to segregate in your mind the evidence that is properly to be considered against the defendant Mr. Opper from that which is not to be considered against him. Then having done that to weigh the evidence remaining against him upon the government must confine itself in undertaking to establish a prima facie case.

To assist the Court in this task first of segregating the evidence to determine what of the evidence properly applies to Mr. Opper and what may not be considered against him, we have as I indicated before attached to the appendix of this memorandum a so-called chart consisting of two columns. It appears on page 27 of the memorandum. It is divided longitudinally in two parts, Column 1 and Column 2.

In Column 1 we have undertaken to set forth the evidence which may be considered as against the defendant Opper. Although we have attached a footnote reciting that the defendant Opper by conceding that all of the testimony of the witnesses listed in Column 1 of this chart may be considered against him arguendo for purposes of this motion, however, we wish it clear that we wish to preserve the record heretofore made and all objections as to the relevancy, competency and materiality of all the evidence in the case. Aside from that reservation we have undertaken, we think objectively to divide this evidence into one of these two categories.

Obviously those items of evidence whether in the form of exhibit or in the form of testimony which have been set forth in column 2, that is to say the column headed "Evidence which may not be considered as against the defendant Opper" includes Government's Exhibit 1, which was not received in evidence, Government's Exhibits 14 and 16, which respectively constitute the personnel file of Mr. Hollifield and a part of that file which was excluded. In addition to that we maintain that Exhibits 36 through 40 may not in any of their parts be considered against the defendant Opper. Exhibits 36 through 40 are as follows: 36 is a card, which your Honor will recall, stating a portion of the Bill of Rights on one side which was presented to Mr. Hollifield to advise him of his Constitutional rights. Clearly that has nothing, of course, to do with Mr. Opper.

Exhibit 37 is the written statement of defendant Hollifield given to the OSI, some parts of which were deleted, which statement was dated September 26, 1951. That, of

all the evidence written or oral constituting statements or admissions made by either of the defendants in this case on and subsequent to September 26, 1951, it is your position that they ought to be stricken. But if they are not stricken, still there isn't sufficient to justify the Court to give his case to the jury.

Mr. Kelley: The defendant Opper is entirely willing, if the Court should desire to pass upon the motions to strike first. Thus it will serve the purpose of the defendant Hollifield in his motion for dismissal. But I want it clearly understood that as to the defendant Opper, whether or not the Court grants the motion to strike, we maintain has no bearing whatsoever on our motion for dismissal.

The Court: You claim even with it all in, still there is not sufficient to warrant the Court in submitting the case to the jury; is that correct?

Mr. Kelley: Yes, sir.

The Court: Let's get back to your motion, Mr. Meyring. I am sorry. We ought to have your motion to strike first.

Mr. Meyring: That was our thought.

The Court: Suppose you read your motion to strike into the record and we will consider for our present purposes as if it was read first.

Mr. Meyring: "Motion to Strike. Now comes Robert George Hollifield, Sr., one of the defendants herein and by his undersigned attorneys moves the Court to strike from the evidence the following: Government Exhibit No. 37, Government Exhibit 38"—

The Court: Do you think it will be all right to say there: "The testimony now in evidence"—

Mr. Meyring: From Government's Exhibit 37 for identification, because it is not all in evidence at this time, the whole of it.

The Court: Yes. "And moves the Court to strike from the case the evidence now in the record, that has now been placed in the record on Government's Exhibit 38 for identification." That is a little technical perhaps, but to keep the record straight about it. All right.

Mr. Meyring: Your Honor, Government's Exhibit 38 is the written statement of Hollifield.

The Court: That is right. 37 and 38 are the written statements, which thus far have been marked for identification only, because portions of those statements were deleted by the government. They did not offer that part in evidence.

Mr. Meyring: That is right, your Honor. Well then, we would like to have the Court's permission to amend the motion to that extent.

The Court: That is perfectly all right. You may do so and the record may so show.

Mr. Meyring: —"Government Exhibit 39, Government Exhibit 40. Said Government Exhibit 37 being the written statement of defendant Hollifield given to Moncure Noble, special agent, of the Office of Special Inspection, at Wright-Patterson Air Force Base, Dayton, Ohio. Said Government Exhibit 38 being the written statement of defendant Hollifield given to Clay W. Pardo, special agent of the Federal Bureau of Investigation. Said Government Exhibit 39 being the shorthand notes taken by Edward C. Scharrer, Stenographer in the Grand Jury proceedings. Said Government Exhibit No. 40 being the transcription of the shorthand notes taken by Edward C. Scharrer, Stenographer in the Grand Jury proceedings.

"This moving defendant further moves the Court to strike from the evidence all of the testimony of the witnesses Moncure Noble, Clay W. Pardo and John DeNeale, Special Agents, relating to admissions, written or oral, made by the defendant Hollifield." Signed by Svoboda and Meyring, Attorneys.

course, we maintain may not be considered against Mr. Opper at all.

The next exhibit would be 38.

The Court: The physical 37 marked for identification only. I was trying to keep the record straight. I don't think it makes any difference on that point.

Mr. Kelley: The substance of those statements have been read into the record by the witnesses. So my argument should more properly say that the testimony of witnesses concerning the contents of those exhibits may not in any part or form be considered against the defendant Opper.

The Court: I understand that is the point. I only mentioned the other to keep the record straight.

Mr. Kelley: In addition to that we list—to those exhibits, we list as testimony which may not be considered against Opper in any of its parts or in any way all of the testimony of special agent John DeNeale concerning any conversations had with the defendant Hollifield; all testimony of the witness Moncure Noble of the OSI concerning conversations had with or made by the defendant Hollifield; all testimony of special agent Clay W. Pardo bearing upon conversations had or statements made by the defendant Hollifield, and lastly all of the testimony, plus the exhibits identified by the witness Edward Scharrer, who was a court reporter who transcribed the testimony of Mr. Hollifield before the Grand Jury, which testimony was introduced in evidence.

That in sum represents the exhibits and the oral testimony which the defendant Opper maintains may not be considered against him either as direct evidence or as circumstantial evidence, or for any purpose whatsoever, in passing upon the merits of this instant motion. On the other hand by a process of elimination, in the column 1, evidence which we say arguendo may be considered as against the defendant Opper, comprises all of the other

exhibits admitted in evidence and all of the testimony of every other witness not heretofore mentioned.

Proceeding from the point of segregation just touched upon, it is the position of the defendant Opper under point 3 of his argument that the evidence introduced by the government which may be said to be competent and applicable to the defendant Opper is, as a matter of law, insufficient to establish the guilt of Opper beyond a reasonable doubt in respect of any of the crimes charged against him in the indictment.

As a subhead under that point 3 of argument, we have undertaken to discuss the matter in six categories. When we discuss the evidence generally at pages 12 to 19 thereof, we discuss the evidence and all of it which is admissible against Mr. Opper as it applies to count 1 and in 3 the evidence as it applies to count 2 and subsequently 3 and 4, and lastly the conspiracy count 5.

Well, I don't know who is keeping track of the time.

The Court: You go ahead.

Mr. Kelley: Well, I will not in the time requested and granted me go into the other aspects of the brief. I would like to touch upon that point 3. We have undertaken at page 12 to set forth paragraph by paragraph, which paragraphs for convenience are designated A, B, C and D and running from A through Y, every element of evidence which within our memory we could recall as being in this record and competent as against the defendant Opper.

Now surely we may have omitted in that summary some element of evidence that we just inadvertently overlooked. On the other hand it may be our view that an element of evidence in the record which we have not listed here, not admitting it to be material or substantial, might be viewed otherwise by the government. But I undertook only to represent that in point 3, subparagraphs A through Y, we have made a conscientious and honest effort to set forth what we believe represents all of the material and substantial evidence properly admissible in this case as against Mr. Opper.

I will not undertake therefore to go into the items item by item because your Honor will do so in reading it. But out of all this and in concluding in subsection 1 of point 3, at the end of this summary, from A to Y, the points of evidence, the defendant Opper says this:

"The foregoing summary of the Government's proof substantially encompasses the evidence which may be considered at this stage of the trial as respect the defendant Opper.

"None of the things done by Hollifield," that is, these acts and things which are listed from A to Y, each being elements of evidence in this case, many of which are evidences of things done by defendant Hollifield, such as the preparation of R and R's, attending of a conference, and so on, Defendant Opper says none of these things done by the defendant Hollifield, for example, "the part he played in connection with the R and R of November 22, 1950, Government's Exhibit 44, addressed to the contracting officer and reciting that the ski goggles and other government surplus components submitted by the contractor Cappel, MacDonald and Company were deemed suitable for use in the E-1 kit; likewise the part he played, if any, in the preparation and submission to the vision laboratory of the R and R dated January 16, 1951, Government's Exhibit 26, or the R and R dated January 25, 1951, Government's Exhibit 28-A"; which incidentally is the subject of an overt act, "or the representations which he made during the conference, allegedly attended by Hollifield, Murray, Strand, Moss, Opper and an unknown man, Mr. X, in the vision lab. shortly prior to January 25, 1951. None of these acts by the defendant Hollifield is attended with the slightest color of impropriety or criminality, save and except for Hollifield's statement to FBI agents to the effect that these acts 'represented his effort in approving Mr. Opper's goggles'."

In that statement, and in that statement alone, and in statements of similar meaning, which appear repeatedly, let us say, in other interviews or in his written statement, in that statement alone, that these acts which I have just

catalogued represented his effort in approving Mr. Opper's goggles, that statement alone gives color of criminality or impropriety to such acts. Absent that confession, absent that admission that those acts represent his efforts to obtain approval of Mr. Opper's goggles, absent that statement, none of those acts of Hollifield have any color or impropriety. Indeed, as is pointed out in a footnote, those acts "were nothing more or less than acts normally required under his official job classification which was read into the record from his personnel file by the witness Ruth McCally."

Restate every one of those things which I have catalogued, the preparation of an R and R, stating the contractor has asked that these goggles be tested and approved, we submitted them, we recommend they be approved for the following reasons: attending a conference in connection with such subject matter and orally stating that we recommend approval for these reasons: All of the conduct on the part of Mr. Hollifield was no more than the customary function connected with his duties. It does not represent any departure from the normal. It was normaley itself, save and except for the criminal color given to it by the observation in Mr. Hollifield's written statement that he performed those acts and the performance of those acts represented his effort in approving Mr. Opper's goggles.

But I say to your Honor, since nothing contained in the Hollifield statement may be considered in the slightest degree directly or circumstantially against Mr. Opper, then I say that is out of the case. Absent that confession and absent the confession, these acts of Hollifield are completely proper and in no sense whatever criminal.

That is true as to everything that it has been alleged here that Hollifield did and everything that it has been proved here that Hollifield did at the lab. No act, no act of his can be characterized as illegal or improper, save through the color given to those acts by his confession, which confession cannot be considered in determining Mr. Opper's guilt in the indictment.

"With all of the earnestness at their command, counsel for the defendant Opper submit that the government's case against Opper is insufficient, as a matter of law, for the reason that absent the written confessions and the oral inculpatory admissions of Hollifield there is no evidence whatever, either direct or circumstantial, of any agreement for the payment or the receipt of money as between Hollifield and Opper as compensation for any services rendered or to be rendered by Hollifield for Opper."

I have adverted to circumstantial evidence. No matter who it be who undertakes to segregate facts once having been—his mind impressed with their existence, be he judge of great experience, be he the greatest savant or student in the world, I maintain it is almost impossible to eclipse something from the mind when it is intimately connected with something the man wishes to consider

Thus it behooves this Court with the greatest care and perspicacity to consider at all times and be sure at all times that he is not viewing a fact in evidence in the light and color of something said in Mr. Hollifield's confession, which cannot be considered against Mr. Opper.

In the sense then that we might fall into error in considering such color, such statements of an inculpatory nature, in the sense that they might be circumstantial, there we must guard against error.

As pointed out in footnote 2 on page 18, "One must not permit himself to acknowledge that inculpatory statements and admissions by Hollifield cannot be considered as direct evidence against defendant Opper, and, at the same time unconsciously fall into the tragic error of considering such inculpatory statements by Hollifield as circumstantial evidence against Opper. None of the inculpatory statements or admissions made by Hollifield were made during the course of or in furtherance of the alleged conspiracy and they may not be considered against defendant Opper either in a sense of direct evidence or in a sense of circumstantial evidence." In short, they cannot be considered at all

I have, I know, gone over my time by now and I shall cease. But we undertook at this point, having treated of the evidence generally and having made that statement upon which we stand, that the government has failed to make a prima facie case against Opper, because absent the confession of Hollifield, there is no proof whatsoever of an agreement to receive or pay money in consideration and as compensation for services to be performed by Mr. Hollifield for Mr. Opper, no proof whatsoever absent the confession.

We go on then to restate that statement that confession, but to apply it specifically to the charging elements of each count of the indictment, with the ultimate demonstration crystal clear beyond the shadow of a doubt with respect to every charge against Opper, always there stands as a bulwark between him and the government's claim, there is no proof of any agreement to pay money or receive money for services rendered or to be rendered by Hollifield to Opper, absent Hollifield's confession.

With that and with the most respectful wish that your Honor will do us the great courtesy of reading our memorandum in full, I close with my thanks, sir.

The Court: I assure counsel now I will read every word and paragraph of your memorandum. I understand you worked hard to get this up for the benefit of the Court. I understand the responsibility that rests upon counsel and the very grave responsibility that rests upon the Court and I shall approach this with that idea in mind. You may be sure I will give it every word of it—I will not only read it, but I will give it my consideration, that you may be sure of.

Mr. Kelley: Thank you.

The Court: I want counsel to be sure of that, that I do not treat this matter lightly, as I know counsel haven't. I do not think you should. In your position you have a grave responsibility too and so does the Court. I assure you that commensurate with the work you have done I shall go very carefully over everything that is in here.

Now I think we better hear, perhaps, from counsel for Mr. Hollifield on their motion to dismiss or in the alternative for judgment for acquittal.

Mr. Meyring: Shall we read this into the record now?

The Court: Yes, if you please, read your motion into the record.

Mr. Meyring: Motion for dismissal of the indictment as to defendant Robert George Hollifield, Sr., and motion in the alternative for judgment of acquittal as to the defendant Robert George Hollifield, Sr.

"Now comes Robert George Hollifield, Sr., one of the defendants herein, by his undersigned attorneys, at the close of the government's evidence and moves the Court to dismiss the indictment in the above entitled cause as to the defendant Robert George Hollifield, Sr., or in the alternative moves the Court to enter a judgment of acquittal as to the defendant Robert George Hollifield, Sr., in the above entitled cause."

That is signed by Frank J. Svoboda and Arthur W. Meyring, Attorneys for the defendant Robert George Hollifield, Sr.

Now your Honor, in the memorandum we have set out as follows: "The merits of the instant motion are predicated on the proposition that as a matter of law the earlier motion to strike filed herein or which will now be filed by the defendant Hollifield should be granted. Assuming therefore for the purposes of this motion that the motion to strike be granted, the following points of argument are respectfully submitted:

Point 1. Evidence of any and all statements of William J. Opper to codefendant herein whether written or oral not made during the course of and in the furtherance of the alleged conspiracy is inadmissible against this moving defendant and may not be considered by the jury in determining his guilt or innocence. Likewise, no weight whatever should be given to such evidence by the Court in passing upon the merits of the instant motion.

"Point 2. The evidence introduced by the government which may be said to be competent and applicable to the moving defendant is as a matter of law insufficient to establish his guilt beyond a reasonable doubt in respect to any offenses charged against him in the indictment."

Now in the argument, your Honor, on Point 1 we set out by way of argument in support of point 1 above, the defendant Robert George Hollifield, Sr., adopts by reference the argument set out in point 2 in defendant Opper's memorandum filed in support of defendant Opper's motion for dismissal, with the understanding that wherever the name Opper appears in said reference memorandum the name Hollifield shall be deemed to take its place and conversely wherever the name Hollifield appears in said reference memorandum the name Opper shall be deemed to take its place.

Now that is as to point 1 as set out on page 2 of the memorandum, your Honor, and as to point 2 on page 2 of the memorandum.

The Court: It is really page 1 of the memorandum, isn't it?

Mr. Meyring: Page 1 of the memorandum; page 2 of the motion, your Honor. They are joined.

The Court: Page 1 of the memorandum. The first page is the motion itself.

Mr. Meyring: That is right. By way of argument in support of point 2 above defendant Robert George Hollifield, Sr. adopts by reference the argument set out in point 3 in defendant Opper's memorandum filed in support of defendant Opper's motion for dismissal, with the understanding that wherever the name Opper appears in said reference memorandum the name Hollifield shall be deemed to take its place and conversely wherever the name Hollifield appears in said reference memorandum the name Opper shall be deemed to take its place.

Now, your Honor, in view of the extended argument by Mr. Kelley and in view of the statements to the Court in point 1 and point 2 of the argument, we feel that there isn't any more argument necessary to the Court at this time on this particular motion.

The Court: Now, Mr. Meyring and Mr. Kelley, too, perhaps, I know unwittingly perhaps I put the cart before the horse here. I did not quite understand this. Now, on your motion for dismissal I see the memorandum. You start out the memorandum by saying that the merits of the instant motion are predicated on the proposition that as a matter of law the earlier motion to strike filed by the defendant Hollifield should be granted. Now perhaps we should have done this the other way.

Mr. Meyring: That was predicated on the fact that the Court would ask for the motion to strike earlier than the motion to dismiss. I did change it in the record. I said "or which will be filed shortly".

The Court: I say, perhaps I misled counsel about this. I didn't understand it that way. I understood that your original motion was to dismiss the indictment, which, of course, would have nothing to do with any evidence in the case at all, as I understand. That is based on the indictment itself, as I understand it. And then second was in the alternative, an entry of judgment of acquittal. Now, if you think it is better, why, we will put in the motions to strike first and have you argue that now.

Mr. Kelley: May the Court hear me? What is true as respects the defendant Hollifield, as to which motion should be argued first and whether one depends upon the outcome of the other, is not true as respects the defendant Opper. I would like to suggest why that is so.

In this case there has been admitted either in written or oral form admissions made by the defendant Opper. We contend that there is nothing in any of his admissions, Opper's, either written or oral of an inculpatory nature. All

it amounts to in sum is that he made an admission that he paid certain moneys to Mr. Hollifield as a loan. That is all. On the other hand, when we consider the nature of the written and oral statements of Mr. Hollifield, they go farther and conceded y are inculpatory in nature. Particularly by virtue of the fact, as I quoted in the earlier argument, that he says, "These services that I did were in furtherance of my agreement to perform them for Mr. Opper." That is, in differentiating between the position of Hollifield and Opper at the Bar at this moment, I say in conclusion that it matters not to the defendant Opper whether this Court rule first on his motion to strike or rule first on his motion to dismiss, because we predicate our motion to dismiss upon the ground that absent the Hollifield confessions, and they must be absent, that we are entitled to a motion to dismiss.

Now, as I understand it, from the standpoint of counsel for Mr. Hollifield, they proceed first, if they should like to have their motion to strike the Hollifield admissions first. Thus, if it is granted, the Hollifield admissions are out of the case for all purposes and thus as to them there remains only evidence, which they maintain is not sufficient to establish a cause of action.

The Court: I understand the position of counsel for defendant Opper is this: That you feel and move the Court to strike certain evidence as pointed out in your motion from the record in this case. Incidentally, the motion says, Government's Exhibit 37, which we understand now technically is not in evidence in this case. However, so much of Exhibit 37 as the government has wished to introduce is in evidence in the case and I will treat it that way.

Mr. Kelley: That is the defendant Opper's motion that you are reading. That is defendant Hollifield, I believe.

The Court: Pardon me. I am sorry. I will sustain a motion of my own. I will strike that out because I don't think it is of any consequence. It is the defendant Opper's. That certain testimony to which you refer here —

In the memorandum, your Honor, it is respectfully submitted that the above referred to statements and admissions, written or oral, made by the defendant Hollifield, exclusively relate to admissions not made during the course of and in the furtherance of the conspiracy charged and said statements and admissions being of an inculpatory nature and in the aggregate being tantamount to a confession of guilt, the same are inadmissible in the absence of some proof independent of such inculpatory statements and admissions establishing that in fact a crime has been committed by someone, whether that someone be the defendant Hollifield or someone else.

Now, your Honor, there is an additional memorandum to be filed which will be a joint memorandum, which is here now. (Hands to the Court.)

The Court: This is a joint memorandum?

Mr. Meyring: Joint memorandum of the defendants.

The Court: All right. Now this memorandum bears on the motion to strike.

Mr. Meyring: To strike, your Honor.

The Court: Is that correct?

Mr. Meyring: Yes, your Honor.

The Court: All right.

Mr. Meyring: That is what we have to present on the motion to strike, your Honor.

The Court: Now I think that the Court probably should take up, as far as the defendant Hollifield is concerned,—take the motion to strike first, because your argument to some extent at least is predicated apparently on the theory that the motion to strike will be sustained or should be sustained.

Mr. Meyring: That is right, your Honor.

The Court: All right. I understand it. Now, did you have something further, Mr. Kelley, on the motion—

Mr. Kelley: Yes, I have. Of course, we are taking advantage of the government by getting our motions out of order and they have no chance to respond as yet. I haven't as yet read into the record the motion to strike filed by the defendant Opper.

The Court: Yes, I think you should do that.

Mr. Kelley: (Reads) "As of this day the defendant William J. Opper has filed his motion to strike in the following words, to-wit: Comes now the defendant William J. Opper at the close of the government's evidence and moves the Court to strike from the record in this case all of the evidence, written or oral, constituting statements or admissions made by either of the defendants in this cause on and subsequent to September 26, 1951."

The motion just read bears the notation at its foot, as follows: "A joint memorandum has been filed by the defendants in the above entitled case in support of the foregoing motion and in support of a similar motion filed on behalf of defendant Robert George Hollifield, Sr."

Now, your Honor, is it thought best now to go ahead and argue the motion to strike and then come back to the other?

The Court: I think it would be better and then the government can answer.

Mr. Kelley: I think it is the understanding that counsel for defendant Hollifield would proceed first then in that argument.

The Court: They have already presented all they have to say on the motion to strike, as I understand, and a joint memorandum has been filed.

Mr. Kelley: Again, if your Honor please, what has been said by me and I am sure what has been said by your Honor before, with respect to the memorandum in sup-

port of the motion to dismiss, I am sure hold true in respect of the joint memorandum. That being so I think it is wasteful of time to echo more or less, or repeat what is here, other than to make this statement: There was considerable argument heretofore on the question of whether or not sufficient corroboration—on the question of whether or not there was evidence in the record at the time inculpatory statements were offered that would permit their introduction as of that time. We took the position it was premature and the matter was argued; the matter was passed upon and they were admitted from that standpoint.

However, we come now to the substantive aspects of the law as to the question—bearing on the question of the necessity on the part of the government sometime during its case and at least by the time it rested its case, to establish by evidence, independent of a confession, proof tending to establish the corpus delicti.

Now counsel pointed out, I believe it was Mr. Richter, that in his study of the historical aspects of this rule it appeared to him that there was a wide divergence among the circuits, both as to the rule they adopted and various aspects of the rule, or let us say, various degrees of strength of application, and so on; very unsettled question. But that throughout the years it appeared that the matter was somewhat crystallized into two rules or schools of thought, that which he defined first as the strict rule and the liberal.

We have pointed out in our memorandum that we feel there would be no dispute as between government counsel and ourselves in stating that as we understand the strict rule, it requires proof independent of a confession of every element constituting the corpus delicti before the confession itself becomes properly received in evidence.

Now when we come to the question of the so-called liberal rule we part company in the sense of the meaning we give to the language of the courts which are said to adopt the liberal rule.

In expressing their understanding of so-called liberal rule government counsel have stated that under such liberal rule all that is required is that there should be corroborative evidence tending to prove the facts embraced in the confession.

Now that sounds fine as far as we go. But what does it mean. Defense counsel do not argue with this statement of the liberal rule but we do take issue with the government over what we understand their views as to the meaning of that liberal rule may be.

It is the position of the defense that evidence—and I quote—"evidence tending to prove the facts embraced in the confession" actually means nothing less than proof independent of the confession that a crime has been committed by someone. For example,—while this may appear facetious yet I do not mean it so—if John Doe confessed at one p. m. he bought a straw hat at Brown's store, and two p. m. he had his shoes shined in Green's store; at four p. m. he purchased a screw driver at White's store, and at five p. m. he broke and entered Richard Roe's premises and stole therefrom $100, that the defense did not consider that it would be sufficient corroboration of such confession, even under the most liberal rule, or any other rule, to prove only that John Doe bought a straw hat, that he had his shoes shined and that he purchased a screw driver.

The independent proof contemplated by the liberal rule, no matter where it is expressed in the so-called liberal rule cases, the independent proof even by the liberal rule means independent proof in some degree tending to establish that a crime has been committeed by someone. We do not contend that such proof must connect up a particular defendant with such crime. It is sufficient if such proof demonstrates that someone committed a crime. We do not contend that such independent proof must establish commission of the crime by a preponderance of the evidence. We contend only that some degree of proof, however slight, but nonetheless directly tending to prove, not

such matters as the purchase of a straw hat or shoe shine, but directly tending to prove that the crime has been committed by someone and must be proved by evidence wholly independent of anything contained in the confession.

Defense counsel earnestly submit that the rule, as I have just undertaken to describe it, whether it be called liberal or not, is in fact, the rule clearly adopted in the Markman case, supra, in the Anderson case, and in every other decision cited in either the Anderson or the Markman cases.

I have taken it upon myself to read the Markman and Anderson cases, of course, with great care and to read and research every case therein cited, and I make that statement that the rule as we have just undertaken to describe it, that is to say, that there must be some direct proof tending to establish that a crime has been committed by someone. That is the liberal rule and it is so held in every one of these cases cited in the Markman and the Anderson cases.

We go on to demonstrate wherein it is, in the Markman case it is important to note that there was, and the court pointed out in the Markman case that there was, proof of independent facts that sufficiently demonstrated that the crime had been committed. This proof consisted in that case, the Markman case, of testimony that the defendant engaged in at least one sale of opium, independent proof he engaged in at least one sale of opium. There is proof that a crime has been committed. We don't say they had to prove even Markman did it. They must prove a crime—it must be proven completely that a crime has been committed. It is important to note carefully the language of that Markman case and I have underscored that part of the decision which I think is most important: "Whatever may be the rule elsewhere, we have held that the extra-confessional proof required need not in itself preponderantly establish the guilt of the defendant." We agree exactly. Now I am to the part of the quote which I think most important: If it shows by independent facts that the crime has been committed." That is the Markman case.

In the Anderson case it was held and language here is important because it will bear out what I say, that both Anderson and Markman require independent proof that the crime was committeed. Anderson says, "If there is in evidence, in addition to the confessions, circumstances which, although they may be susceptible of an innocent construction are, nevertheless, calculated to suggest the commission of the crime"—I repeat: "Circumstances in addition to the confessions calculated to suggest the commission of the crime"—that element is there. We go on.

In the instant case it has been proved by evidence, independent of the inculpatory statements of either Hollifield or Opper (1) that on April 14, 1951, defendant Hollifield went to Chicago; (2) that on April 13, 1951, the day before, a telephone call was made from the Hollifield residence to the Opper residence in Chicago; and (3) that a check was drawn by Opper, in the sum of $1000, dated April 13, 1951, was cashed on April 16, 1951.

Now these three elements we contend, as to which the government went to great ends to prove, bringing here people from Kansas City, people from Chicago, to prove these points, obviously it must be the government's theory—if I am wrong they will say so—those three elements, the 'phone call, the airplane trip to Chicago and the existence of the $1000 check, dated the day before the trip to Chicago, but cashed two days later, that those three elements I believe the government will say constitute sufficient corroboration of the Hollifield statement to justify its admission in evidence.

The defense says no such thing. We say that is not tenable. Granted that tested by the language in the Anderson case these three circumstances are susceptible of an innocent construction, but it must be conceded, that in the light of the further language in the Anderson case, which I just quoted, that those three circumstances, the 'phone call, the mere trip to Chicago, the big city, the mere existence of a check for a thousand dollars with Hollifield's name on it, no other, just a check, a thousand dollars, just

the ride to Chicago, a big city and a telephone call, granted, as they said in Anderson, they could be innocent, but the important thing is neither of those three elements alone or together are calculated to suggest the commission of a crime. What crime? The crime of paying and receiving money as compensation for services to be rendered by Hollifield for Opper. That is the crime here. We can't take it in pieces. The crime here as to Hollifield is receiving or agreeing to receive money as compensation for services performed or to be performed by Hollifield for Opper. All of that put together is the crime. I say that is the crime of Mr. Hollifield. Then by some peculiar reasoning, choice of statutes, we say, your Honor, that Opper is charged with aiding and abetting him in accomplishing that. If those be the statutes upon which we are charged, your Honor, we are, so be it. But I say those three elements, the phone call, the trip to Chicago and the mere existence of a check for a thousand dollars, neither connected by name or otherwise with Hollifield, did not, cannot be calculated in the language of the Anderson case, are not "calculated to suggest the commission of the crime".

Now about that check: True they brought a witness here, Mr. Regan, who said: "I got the check." The date of the check was the day before the visit to Chicago. But lo and behold, it wasn't cashed until Monday. But I talked about that to Mr. Opper and he said that he had a fund of cash at home; that he had cashed this check; he mingled its proceeds with his fund and he had paid on the 14th a thousand dollars to Mr. Hollifield. Grant that, your Honor. Let us recall that Mr. Hollifield's next statement says: "I received this money in consideration of performing services for Opper." Let us grant Mr. Opper in his statments to the F. B. I. says, "I gave money to him as a loan."

Your Honor, I suggest that if you think the statement of Mr. Opper, that it was a loan, is incredible, I say to your Honor that its incredibility arises only from the fact that in his confession, Hollifield said it was improper or crim-

inal or for purposes of violating the statute. And since, even though your Honor might, in your own mind, comparing the two, realizes he must not compare them, that the Hollifield confession is out, and one is inclined to say, "I can't accept that statement of Mr. Opper's", it becomes incredible only by your giving consideration to the explanation given in the Hollifield confession, and you may not consider the Hollifield confession. Therefore, as a matter of law, the statement is not incredible and cannot be deemed incredible because there is nothing in the record to suggest it is incredible.

To return then to this check, Mr. Opper says what? "I gave him a thousand dollars, yes." I care not whether it was from the fund or check. He says it was for a loan and there is nothing in the case, absent the confession of Hollifield, to suggest in the slightest degree—One may not infer this is the reason and this is not. One may not infer it is incredible because in doing so we are giving way to that confession of Hollifield.

Therefore, what is the probative evidence of a mere check? The existence of a mere check, what is its weight? The fact that Opper said he gave a thousand dollars to Hollifield goes out of this case in its entirety, if your Honor grants this motion to strike those admissions upon the basis that there is no independent evidence aside from the Opper statement and the Hollifield statement, that the crime has been committed. And if ever I meant anything in the court room in my life, it is this: Absent the confession of Hollifield, and absent the statements of Mr. Opper, there is nothing in this case to suggest any agreement for the payment or the receipt of money for the performance of services. And that is the evidence in which even the liberal rule says there must be some evidence introduced over and above the confessions to establish the crime, some evidence to establish that a crime was committed by someone. And absent these confessions there is no evidence, not a scintilla, that tends to establish the commission of any crime, absent those confessions.

Thus upon the liberal rule, upon the very cases cited by the government to this Court, the Markman and the Anderson cases,—and incidentally, we quote at great length from the case of Forte, which was cited with approval in the Markman case, and I am sure, your Honor, if you haven't already read the case in detail, you will find it is most interesting reading in this matter.

Thus I submit to your Honor, on the authorities on which we all agree should control here, Markman and Anderson and the Forte case, which is approved in Anderson here, there is no evidence here at all, absent the confessions, and I say that these cases hold that there must be some evidence independent of the confessions to establish that a crime has been committeed by someone.

Thank you, your Honor.

The Court: Take a little recess for about five minutes.

Thereupon a short recess was had.

The Court: Mr. Richter.

Mr. Richter: May it please the Court, at the outset we might indicate that it is our opinion that an analysis of the evidence in the case is in order at the beginning, due to the fact that such an analysis is applicable both to the motion to dismiss and to the motion to strike, and in each instance the motion is directed or based upon considerations of the quantity and the effect of the evidence. So that we will proceed to analyze the evidence as we see it bearing on these issues and then discuss in particular the two motions.

The key, as we see it, to the question as to whether or not there is sufficient evidence in this case to connect the defendant Opper with the commission of the crime is to be found in the decision of U. S. v. May, reported, I believe, in 175 Federal (2nd), I think it is page 974.

The Court: That is the old May case. All right.

Mr. Richter: Now in a case of this kind, as was true in the May case, it is virtually impossible to secure direct

evidence of an agreement. The result is that it is necessary to resort to circumstantial evidence and in the May case the discussion of the Court and the emphasis by the Court was on two things, to prove the existence of a conspiracy; first, the rendition of services by one party; second, the payment of money in compensation therefor. And in the May case the court held that the rendition of the services and the payment of the money constituted evidence of an agreement.

Now, having that principle in mind, if your Honor please, we will proceed to analyze the evidence in this case as it affects each defendant. We submit that insofar as the defendant Hollifield is concerned, there is no question at all about the sufficiency of the evidence at this point; none can be raised unless the confessions themselves are stricken, and we will come to that later.

With reference to the defendant Opper we submit to the Court that there are more items of evidence by far connecting independent evidence, connecting Opper to the commission of this crime than the three elements to which counsel for the defendant Opper confined his argument on that subject.

Let us consider what the evidence is. In the first place, we have evidence of services rendered by Hollifield entirely independent of his confessions. We have evidence that early in October of 1950 the defendant Opper learned that contracts were under negotiation at Wright-Patterson Air Base which would involve goggles; that shortly after he learned of this he got in touch with Buchsbaum or Buchsbaum and Company, got in touch with him at Chicago; that during the conversation between Opper and Buchsbaum, Opper requested Buchsbaum to go to the Base and see what could be done about these goggles; that as a result of this conversation, Mr. Buchsbaum went to Wright-Patterson Air Base, at the request of Mr. Opper in order to negotiate with reference to the acceptance of those goggles. Further that Buchsbaum received from Opper a discount of $4000 for his services rendered in that connection.

We have evidence that Opper subsequent to that time visited Wright Field himself. He is placed down there early in October, I think it is, by the witness Holton. We have evidence that as a result of his visit down there, Opper made the acquaintance of certain individuals. One of the witnesses testified that he was seen at the Field approximately 15 times. I think that was the witness Holton. He was in and out.

The witness Jane Morrissey testified that Opper was at the office of the Cappel-MacDonald Company sometime during the fall of 1950. We have evidence further that the Cappel-MacDonald deal—there was a note or a letter written from Cappel-MacDonald to the Field, enclosing certain goggles; that as a result of that letter, later Holton was given certain goggles which he submitted for a test. These were the ski goggles, were given to the witness Strand, I believe, or Moss, one or the other; that as a result of that check the goggles were returned with a recommendation that they did not conform to specifications. The evidence showed that the ski goggles I think were required to be new goggles and that the Opper goggles were not new goggles; they were surplus goggles; that later, on December 27, 1950, a change notice came through approving the used goggles or the surplus goggles, rather, on the Cappel-MacDonald deal.

We have evidence further that the defendant Opper attended a conference on January 24, 1951, which conference had reference not to the ski goggles, but to the sun glasses, or the plastic goggles, which were the subject of the Buchsbaum contract. At this meeting which was attended by Opper, by Hollifield and by Strand and by Moss, it was agreed that the deviation from the specifications with respect to the sun glasses would be approved for certain reasons.

The testimony is that Mr. Hollifield bore the brunt of the conversation at this meeting and that at its conclusion Mr. Hollifield was instructed by Strand and Moss to go back and secure and provide a written request for a formal written approval of the deviation.

So that we have evidence in the case of services rendered by Hollifield to Opper, both in connection with the Cappel-MacDonald contract and in connection with the Buchsbaum contract, and we place Opper at the Field and present at one of the conferences at which the deviation was authorized.

In addition to that we have evidence of payments made by Opper to Hollifield.

Now, our version of the significance of the Opper statement with reference to the payments, not only of a thousand dollars as counsel indicated, but of $1200, two payments. We have evidence that these payments were made.

Now, accompanying the statement as to the making of the payments, the statement by Opper is what he undertakes to consider as an explanation of the circumstances and the reason for the payments.

Now, taking all of these circumstances into consideration, it is the position of the government that they constitute, together with the evidence of the services rendered at the Field, substantial evidence inconsistent with innocence of the defendant Opper, entirely independent of any confessions or inculpatory statements of the defendant Hollifield.

Let us consider the admitted payments of Opper a little more closely. He concedes that Hollifield came to Chicago. There is some little discrepancy between the two statements of the two defendants as to where it took place. I think Mr. Opper intimated that the conferences about the thousand dollars took place in a restaurant in the Wrigley Building and that the payment was actually made in the rest room of the restaurant, but he concedes he did pay a thousand dollars on that occasion.

Now, he undertook to explain the reason for that by advancing the fact that it was supposed to be a loan; that Hollifield came to him and said his house was under mortgage and that he was having difficulty keeping up the payments.

We also have the testimony of the witness Regan, how-

ever, that when pressed and quizzed as to the circumstances of this transaction, Mr. Opper admitted that he didn't even know that Hollifield owned a house and had made no inquiry. He admitted further that he had no note or security of any kind. He admitted that no interest was to be paid. The only statement he made as to the time of repayment had to do with some vague period of two years.

Opper also admitted that he had made a further payment at Dayton, Ohio, in August, I believe, of 1950, of $200 to complete a so-called $1200 transaction.

We likewise have in evidence the statement of Mr. Regan that Opper admitted that he had made no effort whatever—he had made one effort to see what money could be obtained and had received a non-committal reply.

Now, if the Court please, we submit that if it is admitted that two payments were made by the defendant Opper totaling $1200, if it is further conceded that there is evidence in the case of Opper's interest in these contracts as a sub-contractor, that he employed Buchsbaum at a figure of $4000 to visit the Field and attempt to negotiate these changes, that he later went to the Field himself and attended conferences with reference to these changes, that taking all of those circumstances into consideration that we certainly have substantial evidence inconsistent with the innocence of the defendant Opper, sufficient to take the case to the jury.

Now, of course, it isn't necessary, in order to take the case to a jury, that there be no conflicting testimony. We can take Opper's attempted explanation of this as to the existence of a loan as being to some extent perhaps contradictory of the circumstances indicating his guilt. But if, regardless of that, the circumstances relative to these loans and the admissions of Opper are sufficient or inconsistent with innocence in themselves, regardless of any contradictory evidence, we have a case to go to the jury on.

So that summing up the position of the government with reference to the sufficiency of the evidence independently of the confessions, we believe that there is

enough to submit the case to the jury and that we have definitely a jury case with reference to Opper's connection with the deal.

Now, of course, in that connection—oh, yes. There is another point I wanted to make and that is that these services rendered by Hollifield are sufficient consideration for the payments to Hollifield by Opper, even though they were routine services. Under the law there isn't any exception as to the nature of the services to be rendered in that if they are merely routine services which he might have performed anyway, that doesn't constitute a violation of the law. The law simply states that any government employee who receives compensation for services rendered of any kind whatever, whether they are routine or not, is guilty of a crime.

This same observation would apply to the contention that Hollifield in performing these services was guilty of no impropriety. Perhaps there were considerations which would justify his doing as he did regardless of that, whether there was any impropriety or not in the actions of Hollifield in approving these goggles. The essence of the crime lies in the impropriety of accepting money for his services, which is calculated to affect his judgment in a matter in which the government was interested.

So that, if the Court please, under the authority of the May case, which holds that receipt of money and the rendition of services in themselves constitute evidence of an agreement, we submit that we have sufficiently proved the rendition of services and the receipt of money and that the case should go to the jury for such decision as the jury might arrive at, taking into consideration Opper's admitted explanation as to the circumstances of these payments.

Now, if the Court please, with reference to the motion to strike, I believe that the law of the case is announced by the Court in its ruling on the motion as to the time at which these inculpatory statements could be admitted is fully applicable now on the substantive question as to

whether or not these inculpatory statements are admissible at all.

The basis of the Court's decision on the preliminary motion was the Anderson case in the Sixth Circuit, and the Markman case in the Second Circuit, and the Daeche case in an opinion rendered by Judge Hand some years ago. The Daeche case being the leading case in the so-called liberal interpretation of the rule.

Now apparently counsel for both the government and the defendants are in agreement that the Daeche case and the Markman case and the Anderson case are conclusive of the issue in this Court, the difference being over the interpretation of the evidence in this case which corroborates the inculpatory statements of Hollifield. Counsel for defendants next argument on this point has attempted to limit the corroborating testimony on Hollifield's confessions simply to three circumstances relating to the payments of the check up at Chicago.

We submit to the Court that such a limitation is not in order, that in deciding this question, the occurrences at Chicago cannot be considered in themselves alone, but must be considered in connection with all of the evidence in the case, including what went on at Wright-Patterson Air Base. The payment at Chicago taken in itself, of course, if you don't relate it to services that were rendered at Wright-Patterson Air Base, is of no significance. But it does in our opinion, when you take all the circumstances into consideration. Opper's interest in this thing as a subcontractor, his visits to the Field, his attendance at conferences, the results of those conferences which changed the contracts and brought about deviations in specifications, all of these circumstances taken together, do constitute evidence sufficient to take the case to the jury that a crime was committed.

Consequently we differ with counsel for defendants in that it is the position of the government that any corroborative evidence as to the payment of the money at Chicago, or as to a visit to Dayton by Opper, or as to payment at

Dayton by Opper, all of those corroborative circumstances do, as a matter of fact, tend not only to corroborate the truth of the confession, but that they tend further to establish that a crime was committed, that crime being the receipt of money for the rendition of services and the aiding and abetting in that crime of the defendant Opper.

I would like also, if the Court please, to make one additional point and that is to raise the question which I think is a serious question as to whether or not the giving of a loan by Opper to Hollifield under the circumstances of this case is not in itself a violation of the statute. At a later date it may be we will submit to the Court in connection with this charge on that point. It would appear to counsel for the government that if a merchant who is interested in securing favors at Wright-Patterson Air Base does agree to loan money under circumstances of this kind, with no interest, no security, no definite time of repayment, that that in itself would constitute a violation of Section 281 of the United States Code.

We have had quite a bit to digest here in the briefs which have been submitted. We haven't had full opportunity to analyze all of the points that have been made. Our position, however, is substantially as I have indicated it to the Court, that there is substantial evidence in this case inconsistent with innocence, justifying its submission to the jury as to the defendant Opper; that there is no question whatever as to the submission of the case as to the defendant Hollifield on the basis of his confessions, if those confessions were properly admitted. And as to whether those confessions were properly admitted, our position is the same as it was the other day, to-wit: That it is not necessary in order to permit the introduction of statements, inculpatory statements, that the corpus delicti be proved before the statements themselves can be admitted. At that time, we submitted a number of decisions to the Court on which we based our position. In addition to that we have any number of other cases that likewise support the rule, the liberal rule. When we have

an opportunity we will dictate a brief memorandum just outlining these decisions. We have about 15 of them here which support the position that the Court has taken on the matter at this time.

The Court: Want to pass them up or put them into the record?

Mr. Richter: I will dictate them into the record. Does the Court want them in the record?

The Court: Whichever you prefer.

Mr. Richter: I will dictate them in the record and we will submit the decisions to counsel for defendants. Ryan v. U. S., 8th Circuit, 99 Fed. (2nd)

Mr. Kelley: Excuse me. May I suggest we do that after our arguments are over?

Mr. Richter, All right. Is that agreeable to the Court, that we dictate this in after the arguments are over?

The Court: Am I supposed to look at them?

Mr. Richter: You may have them. The government does want the Court to see that there are other decisions.

The Court: You better put them in the record. I haven't the faintest idea what they are.

Mr. Richter: I will put them in the record.

The Court: You haven't another memorandum. I don't know how I would get them.

Mr. Richter: I will put them in the record. Ryan v. U. S., 8th Circuit, 99 Fed. (2nd) 864. Prichard v. U. S., 181 Fed. (2nd) 326. That is a 6th Circuit decision, 1950, which quotes and approves the Anderson case. Wiggins v. U. S., 9th Circuit, 64 Fed. (2nd) 950. Sixth American and English Encyclopedia of Law, Second Edition, 582. Mangum v. U. S., 289 Fed. 213. Wynkoop v. U. S., 22 Fed. (2nd) 799, 9th Circuit.

I believe that is enough, if your Honor please. We could go on citing them more or less indefinitely.

Counsel has referred to the Forte case as being cited with approval in the Markman decision. The Forte case is a decision in the District of Columbia Court of Appeals, I believe, which is an extreme example of the opposite rule as announced in the Daeche decision. The reference to the Forte case in the Markman case, we believe, is limited to a specific matter referred to in the Markman case and, of course, the rule as announced in the Markman case is directly contradictory of the rule announced in the Forte case. The Forte case is cited as the classic example of the so-called strict rule and our point here is if there was any reference in the Markman case to the Forte case it did not approve the doctrine of the Forte case in toto, but may have had reference to a particular part of the Forte decision.

We, therefore, submit, if your Honor please, in the first place that there is no basis for the motion to strike the confessions in this case under the authorities which we have just cited to the Court, that if there is no basis for the motion to strike the confessions as to the defendant Hollifield that clearly his confessions under the rule of the Markman case constitute very strong evidence of the corpus delicti, that there is sufficient evidence in the record corroborating the truth of the confession and further supporting the contention of the government that a crime has been committed, taking into consideration all of the evidence that has been introduced both as to payments and as to the rendition of services; that there is sufficient evidence to take the case to the jury not only as to the defendant Hollifield, but as to the defendant Opper on the question as to whether his payments were made under such circumstances as to indicate a crime, or whether his explanation is valid. Further, that there is serious question as to whether his attempted explanation, that this was merely a loan, is actually a valid legal defense, in view of the fact that the giving of a loan to a government

employee of the kind that Opper testified to here would certainly be compensation of some kind within the meaning and intent of Section 281 of the United States Code.

We therefore submit that the motion to strike should be overruled and the motion to dismiss should be overruled and that the alternative motion to direct a verdict for the defendant Opper should likewise be overruled.

Mr. Kelley: It appears generally that Mr. Richter opened his argument in connection with the motions to dismiss and concluded as respects the motions to strike. So I will answer him in reverse order and address myself first in rebuttal to his argument as to the motions to strike.

Now, I did endeavor to make it plain and it so states in our memorandum on the matter on the motion to strike, at the very outset I recite "In the instant memorandum counsel for defendants Hollifield and Opper will confine themselves to a discussion of Anderson v. United States and United States v. Markman and the several decisions cited respectively in each of the foregoing cases." I do not wish it to appear that I am so lazy that that is the only research I have on this problem. I have 52 cases here I could cite and it would take considerable time to do it, certainly everyone of the cases counsel has cited I have read very thoroughly and I am prepared to state that everyone of those cases which he cites, for what purpose I don't know, if they are read will establish that those courts held to the rule which we suggest here is the liberal rule, but they do require apart from the confession independent evidence to establish that a crime has been committed by someone, every one of those cases. As a matter of fact, some of them we treat in our memorandum ourselves. Some of them were cited in the Anderson case and I read every case and can repeat that each one of them cited in Anderson requires first that there be independent proof to establish that a crime has been committed and that to be independent of anything in the confession.

Second, not only is that necessary but in every one of those cases the court will see that the court there poiated

out that there was in those cases independent proof that a crime had been committed in each of those cases and that is what we don't have here.

Take the Anderson case. There was independent proof aside from the confessions that someone had blasted and destroyed electric tension lines. There is proof a crime had been committed by someone. In everyone of those cases, I have them all briefed—I can cite them all and indicate to the Court exactly what nature of crime was committed there and independent proof was submitted in those cases that a crime had been committed. This is the essence of this matter.

We, too, could cite this case:—I take issue with counsel when he says the Forte case is the classic case of the strict rule. That is not so. I went over the Forte case. Incidentally, in the memorandum we have quoted from it at great length and you will find it is not. One element says this: "If there is any substantial element of corpus delicti * * * beyond a reasonable doubt of the defendant's guilt that is sufficient." That is not a strict rule. That is a liberal rule. Forte is known as the liberal rule case.

When it was cited in Markman, they cited Forte in 1952 for a pretty good reason. I don't want to read anything more in their citation than is there. Let's look at the point, the very point that we quote in our brief which I read to your Honor before, the very point of the Markman case, on which we rely: "Whatever may be the rule elsewhere, we have held that the extra-confessional proof required need in itself preponderantly establish the guilt of the defendant; if it shows by independent facts that the crime has been committed." That is the point and it is of everyone of these cases cited in Markman and in everyone of the cases cited here by Mr. Richter. It will be found if the case is read two things, and the court pointed out, that there was in this case independent proof to the effect of establishing that a crime had been committed by someone and the proof so demonstrated in each

case, some homicide, some arson where a burned house was available. In all of those cases we have proof.

Now counsel comes to the very root of it and he says it is very difficult for the government to prove payment or agreement to receive payment as compensation for services. Exactly. But the fact that the government finds itself in a case with difficult proof should not cause us to relax the rules and the rights of defendants who are charged with those crimes. Surely it is much easier to prove a burned house than it is to prove agreement to receive money, but the fact it is hard to prove here should not be to our disadvantage and the requirement of meeting these proofs, not by a darned sight.

In the case of Andrew May, which counsel says should be a guide to us, did we have a comparable situation? There was independent proof in the Andrew May case of payments of money. They did not have to look solely to a confession to find evidence of payment of money. In this case we do. In this case we find no evidence of the payment of money except in going to the inculpatory statements of the defendants themselves and one may not have resort to anything in those inculpatory statements unless and until there is independent proof that a crime has been committed by someone, which in this case the crime is that money was received or agreed to be received. One gets hoist on his own petard.

In the May case there was independent proof that money was received from the Garsons. There was proof of services of a very definite nature here to prove services for money.

The cases are readily distinguished on the very point of argument here. There in the May case they had independent proof. Here we must look only to the confessions to find that. We can't look into the confessions if we are searching for independent proof.

With all due respect which I have in great measure for my brother Richter, I must say that in his argument, his entire argument, he did not undertake to argue from the

standpoint of one defendant at a time; not once did brother Richter undertake to say, "This now is my argument and my case against the defendant Opper" and then later "This is my case against the defendant Hollifield." Had he done so he would have had to progress in his argument as I did and say, "We now consider the case against Opper. I acknowledge in this consideration absent everything said by Hollifield." He did not do that. Nor did he consider Hollifield and say "Absent everything said by Opper" No. He did commit the very thing I say must not be committed under the law by Court or jury. We must not lump this all in a hodge-podge or stew and see what comes out. The law will not permit that. The rights of these defendants will not permit that because we can't consider anything in the confession of a co-defendant in considering the guilt of the defendant under consideration.

It became so customary to Mr. Richter to view this as hodge-podge that he spoke in these terms: He said: "We have proved the payments of $50 and $200 which corroborate the confession."

Let us think about that statement a moment: "We have proved payments of $50 and $200 which corroborate the confession." The only proof of the payment is in the confession. We could argue ourselves in a great circle but the only source for any evidence that payment was made here is in the confession. Counsel says, "We proved payment and payment corroborates the confession," knowing there is no proof in the case of payments except in those confessions. Counsel at no time has approached this on the basis of excluding evidence that cannot be considered against the one. He has lumped them consistently in his argument. And then at long last, at the conclusion of their case for the first time the government suggests, "Maybe we don't have to prove payment of money in this case; maybe it is all right if we could prove a loan." The statute does not say that. We have a right to be charged on this statute. We are not charged here with making a criminal loan or receiving a criminal loan.

Every consideration on this motion must be undertaken first on a basis of segregation of the evidence. To consider this case at all on the motion to dismiss, the motion of either defendant, would be wrong. It would be in violation of the rights of the defendants, unless the one who was considering it first segregated the proof and confined himself to that proof which he might consider for that defendant. They must be considered one at a time.

Naturally, one undertakes in trying a case and preparing it, he feels his case strongly. The prosecution feels its case strongly and so does the defense. We are prone sometimes in our thinking to become opinionated to the point that we will adopt and use expressions which demonstrate to the objective person each opinionated view. Brother Richter repeatedly used this phrase: "Mr. Opper's attempted explanation of the payment of two hundred and one thousand." What does counsel for government do by characterizing that as "his attempted explanation of a payment." He has fallen again into the error that I pointed out in my opening remarks, the error that we must not fall into and do justice to the law as this defendant has a right to do.

As I pointed out before, the Court should consider them together. One man says no loan: the other says a loan. But that cannot be said here because under the law no consideration may be given to what Hollifield said and absent what Hollifield said, it is not incredible. Many loans are made, thousands of loans are made and have been, and I have made them, without a note. It depends on your circumstances and friendship. I don't say there is evidence of it here, but certainly we are arguing objectively. Friendship, many, many motives, charity, certainly for a man in trouble, children are ill, many things could call for execution of a note. He says all those things don't make sense, it is an attempted explanation. He finds it incredible. It could consist of nothing more than suspicious circumstances and it is well settled in weighing the effect of proof that facts which merely give rise to a suspicion have no probative value.

I did not confine myself in my argument to the three circumstances, money, the trip to Chicago, the telephone call and the check. If I did in my oral argument, I am afraid I didn't mention there as I do here, we take those three circumstances and take them in the light of all other proof competent to be admitted to both defendants, absolutely they do not add up to a suggestion that any crime has been committed. It is certainly not even a suspicious circumstance that a business man goes to Wright Field. Chester Buchsbaum has been there hundreds of times, has sat in hundreds of conferences dealing with the government. What they decide as to his interest or his disadvantage, that doesn't create a suspicious circumstance. The government cannot operate without business men. There is nothing about a man that deals in a surplus commodity that is detestable. I say there is no suspicion coupled with a man that has something to sell going to Wright Field or sitting in a conference and the mere fact, in the line of duty, somebody may make a decision which happens to benefit that man, those factors won't give rise to the suspicion and belief that those men are in cahoots and have entered into an agreement to pay money for this service.

The only evidence of payment lies in the inculpatory statements of the defendants, which cannot be considered in determining whether in the case there is any independent evidence to establish that a crime has been committed. Tough as it may be, and I agree it is difficult and ought to be, the fact it is hard to get that proof, the fact the government has not been able to get that proof, that should not serve to allow this case to go to the jury, because the government finds it hard and admits, therefore, an inference that their case is weak, weak to the point of being no case, it should not go to the jury for that reason.

The rights of these defendants must be determined in accordance with the law and the facts must be considered separately as to each defendant on this motion, and first we must rule out, segregate all admissions of the code-

fendant. If that be done, your Honor, if that duty be performed, first rule out all statements made by the co-defendant and then consider the evidence that is properly left against the defendant, if that be done, I submit to your Honor you will find no basis upon which to retain the defendant Opper as a defendant in this case, because there is no proof of an agreement to receive money or compensation for services, absent the confession of Hollifield.

Mr. Richter: May it please the Court, in view of the fact that the position of counsel for the government has been misrepresented, I feel that I should make a brief concluding statement.

I take very serious exception to the claim of counsel for defendant Opper that I did not confine myself to the evidence pertaining strictly to Opper in my argument. I did. Opper did admit that he paid a thousand dollars; he did admit that he paid two hundred dollars.

In addition to that we have evidence of services rendered at Wright Field which is independent of Hollifield's statement.

So that, leaving out of consideration completely any admission by Hollifield, we do have evidence of both the rendition of services and of the payment of money by Opper.

We are not relying on any confessions that Hollifield may have made in order to establish these two payments, not of $50 as counsel indicated, but of a thousand dollars in one instance and of two hundred dollars in another instance. I said nothing at all about a fifty-dollar payment.

Now, we base our contention as to the attempted or so-called explanation of Opper as to the circumstances of this thousand-dollar payment not on what Hollifield said, but on what Opper himself said, the unusual, the very unusual circumstances which can be perceived in Opper's own statement, with no security at all, a hard-headed Chicago business man, gives to a casual business man in Dayton, a total of $1200 purely out of charitable motive. Hard-headed business men don't operate that way and we

think the jury should have an opportunity to say whether they believe it or not. If they are going to give $1200 to anybody, they are not going to pick a man who is making $5000 a year, whatever it is that Hollifield makes at Wright Field, a purely casual business acquaintance, and take that into consideration, indicating Opper's interest in having these deviations approved and Hollifield's attempts and efforts, and successful endeavors to have them approved. Entirely apart from Hollifield's confession there is in this case independent evidence outside of the confessions of Opper's commision of the crime of aiding and abetting Hollifield in violating the statute.

The Court: Mr. Meyring?

Mr. Meyring: Nothing further, your Honor.

The Court: Do you wish to add anything?

Mr. Svoboda: Nothing to add, your Honor.

The Court: Mr. Canny?

Mr. Canny: Nothing.

The Court: Mr. Campbell?

Mr. Campbell: Nothing.

The Court: Mr. Aug?

Mr. Aug: Nothing.

The Court: Very well, Gentlemen, I will take the motions and your briefs and I will try to be able to decide these matters tomorrow morning. Our jury was ordered back at that time. So, if I can, I will try to dispose of them one way or the other as promptly as possible. We won't have to keep the jury waiting here in either event.

Very well. We will adjourn court until tomorrow morning at 11 o'clock.

Thereupon the further proceedings in this cause were adjourned until 11 o'clock tomorrow morning.

Proceedings

Morning Session.

Tuesday, May 27, 1952.

Court met pursuant to adjournment. The jury being absent and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

(Out of the presence of the jury)

The Court: Gentlemen, before I proceed further, I would like to ask a question of counsel for the respective defendants and for the respective parties. You need not answer this question if you prefer not to. I would respectfully request that when you answer the question you do not argue it. I am only asking an answer to a question. You may not agree with what the other fellow has to say, or, pardon me, the other counsel has to say, but I do not care to have you argue that part of it.

Now, Mr. Meyring and Mr. Svoboda, I understand that you are the counsel of record in this case for the defendant Hollifield.

Mr. Meyring: That is correct, your Honor.

The Court: If you care to do so, I would like to have you answer this question: Will you tell me please what it is you claim on behalf of the defendant Hollifield is the *res gestae* in this case?

Mr. Meyring: May we consider that a minute, your Honor.

The Court: Why certainly, of course, you may. I am talking now about the defendant Holiifield only and your views insofar as the defendant Hollifield is concerned. As I have already indicated, I do not require you to answer that question. I would like to have your views, if you care to express them.

Mr. Meyring: May I ask the Court, please, if by using the term res gestae, the Court refers to corpus delicti?

The Court: No. I am referring to what you do not refer to in your briefs and in your arguments. I understand your argument to be that there must first be some proof of the res gestae. That is what you claim, as I understand it, before we can go on with anything about the—What I want to know now is what do you claim to be the res gestae. What do you claim, not anything I have to say about it.

Mr. Meyring: We have used the term corpus delicti.

The Court: Well, just a minute. I heard the word corpus delicti. Perhaps it is in here. I understood what you were talking about was the res gestae. Isn't that correct?

Mr. Meyring: No, no, your Honor.

The Court: Well, what do you mean by the corpus delicti? Let's put it that way. You have no statement to make about the res gestae. You are talking now about the corpus delicti.

Mr. Meyring: That is right.

The Court: Let us find out what your claim is.

Mr. Meyring: May we confer a minute?

The Court: Of course. You may confer with the dictionary or anybody you please. I supposed you knew yourself what you were arguing about here. But if you have to have other counsel, I have no objection to it, of course.

(Mr. Meyring confers with other counsel for the defendants.)

The Court: Perhaps I was in error in this way: Probably we have used the term corpus delicti and the Court probably has used that term. So I think you may answer the question in regard to what you claim to be the corpus delicti in this case. I think that is probably the question I should have asked rather than the res gestae.

(Counsel for the defendants confer together.)

The Court: Before you answer the question, I will withdraw my question wherein I asked you to tell me what you thought was the res gestae. Tell me what you think is the corpus delicti because I really think that is what you have referred to and argued about. So tell me—just answer that question. Forget about the res gestae. Just tell me what you claim to be the corpus delicti in this case. I don't mean in every case. I am talking about the case before the Court on behalf of the defendant Hollifield.

Mr. Svoboda: If the Court please, in answer to your question as to what we consider to be the corpus delicti as to the defendant Hollifield, we concede as to the first four counts of the indictment that the corpus delicti consists of the following interconnected and indivisible acts: The receipt or an agreement to receive compensation by the defendant Hollifield from someone for services rendered or to be rendered by the defendant Hollifield for that someone.

As to the count 5 of the indictment, that is the conspiracy count, we concede the corpus delicti consists of the following: The alleged unlawful agreement between Hollifield and Opper, that is the conspiracy itself, to-wit, the alleged unlawful agreement whereby Hollifield agreed to directly receive from Opper compensation for services rendered and to be rendered by Hollifield, which services Hollifield would render for compensation allegedly paid him by Opper and which services would consist in Hollifield's recommending approval and procurement by the government of certain types of sun goggles and ski goggles, which goggles were in relation to government contracts.

The Court: Thank you. Now, Mr. Kelley and Mr. Canny and Mr. Campbell, anyone or all of you Gentlemen speaking in for the defendant William J. Opper, will you please, if you feel like doing so, give me your idea, your defini-

tion of what you think is the corpus delicti insofar only as the defendant Opper is concerned?

Mr. Kelley: As to the fifth count of the indictment, the conspiracy count, the defendant Opper's views as to the corpus delicti coincide exactly with the views just expressed by counsel for the defendant Hollifield.

As to counts 1 through 4, the defendant Opper conceives the corpus delicti as to him to be, first, proof of the corpus delicti as it has just been defined by counsel for defendant Hollifield, that is to say, proof of the corpus delicti on each of the four counts as against Hollifield. That is number one. And (2), in addition thereto proof that the defendant Opper counseled, aided, abetted, induced and procured defendant Hollifield to commit the acts constituting the corpus delicti as to Hollifield in each of said substantive counts; that is to say, that the defendant Opper counseled, aided, abetted, induced and procured the defendant Hollifield unlawfully to receive compensation from someone for services rendered or to be rendered by Hollifield for that someone, in relation to contracts had between the United States government and certain other contracting parties. That is our understanding of the corpus delicti as respects the defendant Opper in relation to counts 1, 2, 3 and 4 of the indictment.

The Court: Now will counsel for the government please state, if you care to do so, what the government claims is the corpus delicti in this particular case.

Mr. Richter: May it please the Court, counsel for the government concedes the corpus delicti on count 1 of the indictment to be the entering into of an agreement by and between the defendant Hollifield and the defendant Opper to receive compensation by Hollifield for services rendered and/or to be rendered by Hollifield in a matter in which the United Sfates is directly or indirectly interested.

Insofar as the defendant Opper is concerned, the corpus delicti would consist of the receipt by the defendant Hollifield of money tendered by the defendant Opper for the purpose of inducing and aiding and abetting the defendant Hollifield in the receipt of the money contrary to the statute.

In count 2 of the indictment, the government conceives the corpus delicti insofar as the defendant Hollifield is concerned to be the receipt by the defendant Hollifield of the sum of $50 on or about March 1, 1951 for services rendered or to be rendered by the defendant Hollifield to the defendant Opper in a matter in which the United States was directly or indirectly interested.

Insofar as the defendant Opper is concerned in count 2 of the indictment, the corpus delicti would be the payment by the defendant Opper to the defendant Hollifield for services rendered or to be rendered, in which the United States is directly or indirectly interested, thereby inducing the defendant Hollifield to perform such services for compensation.

Under count 3 of the indictment the concept of the government as to the corpus delicti by both defendants would be exactly the same as it was in count 2, the only difference being in the amount of the payment, which in count 3 is charged to be $200.

Under count 4 the concept of the government as to the corpus delicti insofar as both of the defendants are concerned would be the same as it is with reference to counts 2 and 3, the only difference being in the amount and the date of the payment, to-wit, $200 on or about the 5th day of August 1951.

Under count 5 the concept of the government is that the corpus delicti as to both of the defendants consists in the agreement entered into by the defendants under the terms of which the defendant Opper agreed to pay and the defendant Hollifield agreed to receive money for services rendered or to be rendered in a matter in which the United States is directly or indirectly interested. The agreement specifically calling for services in the nature of recom-

mending the approval and procurement by the department of the Air Force of the United States certain types of sun goggles and ski goggles, which goggles were in relation to certain contracts and purchase requests in which the United States was interested and to which it was a party.

In conclusion, the government desires to make it clear that there are two elements in this corpus delicti, one of which primarily affects Hollifield and the other primarily affects Opper. There is the rendition of services by Hollifield as a part of the corpus delicti and the inducement by Opper by the payment of money to Hollifield to procure such services by Hollifield on behalf of Opper.

The Court: Yesterday, May 26, 1952, defendant William J. Opper, after the close of the Government's evidence, filed a motion, in which he "moves the court to strike from the record of this cause, all the evidence, written or oral, constituting statements or admissions made by either of the defendants in this cause on and subsequent to September 26, 1951."

With his motion and in support thereof, defendant Opper filed a joint brief, setting forth his reasons as to why the motion should be sustained. In addition to the brief, the court yesterday heard oral arguments at considerable length by counsel for defendant Opper and by counsel for the Government on defendant Opper's motion to strike.

The Court is of the opinion that no useful purpose would be served for the Court here to take the time necessary to elaborate on the reasons that lead it to its conclusion.

The record speaks for itself. It contains now also the arguments of respective counsel and the definition of each as to what they claim for their respective parties constitutes the corpus delicti in this case.

Upon a consideration of the motion to strike, filed on behalf of defendant William J. Opper, the Court is of the opinion and so finds that the motion is not well taken and that it should be, and it is, overruled.

Yesterday, May 26, 1952, defendant Robert George Hollifield, Sr., filed a motion wherein he "moves the court to strike from the evidence the following:" Thereupon defendant Hollifield sets forth the evidence which he thinks should be stricken. Together with the motion is a memorandum filed by defendant Hollifield's counsel, setting forth their reasons as to why they think the motion should be sustained.

In addition to that, counsel for defendant Hollifield also joined in a joint memorandum filed on behalf of both the defendants, each with respect to the motions to strike.

Upon a consideration of all the evidence in the case, the briefs and arguments of counsel, the Court is of the opinion that the motion of defendant Hollifield to strike, is not well taken and that it should be, and it is, with respect to each piece of evidence sought to be stricken, and in its entirety, overruled.

Yesterday, May 26, 1952, defendant William J. Opper, filed a motion in which he "moves the court to dismiss the indictment in the above-entitled cause as to the defendant William J. Opper, or in the alternative, moves the court to enter a judgment of acquittal as to the defendant William J. Opper, in the above-entitled cause."

With his motion, defendant Opper filed an extensive brief, setting forth the reasons why he thinks his motion should be sustained.

In addition to the brief on behalf of defendant Opper, his counsel yesterday afternoon argued at great length, giving their reasons as to why this motion should be sustained.

The Court has heretofore passed on the question of the dismissal of the indictment and here reaffirms its former ruling that so much of the motion of defendant Opper, wherein he moves the court to dismiss the indictment, is not well taken and that it should be, and it is, overruled.

In considering the motion of the defendant Opper in the alternative, to the effect that the court enter a judgment of acquittal in favor of the defendant Opper, the

Court wants the record to show distinctly that in its ruling on this motion, it is in no way considering or in any way influenced in its conclusion by any testimony which may have been given by way of statements or written confession so-called by defendant Hollifield.

Of course, a motion with regard to defendant Opper must be based wholly and solely on the effect of the testimony in the case so far as defendant Opper is concerned and the law applicable thereto.

The Court wishes also to make it very plain in the record that the Court, in passing on this alternative motion of defendant Opper, is in no way passing on the merits of the case insofar as the facts of the guilt or innocense of defendant Opper are concerned.

It is the contention of counsel for defendant Opper that taking all the facts into consideration as shown by the evidence, the Government has failed as a matter of law to justify the court in submitting the case as against the defendant Opper to the jury.

It is the view of the Court that the testimony and evidence in this case, keeping in mind solely that with respect to defendant Opper, is overwhelmingly such as to not only justify but require the Court to submit his case to the jury. Some of the questions here presented were earlier argued in a way at least in the case at the time the Court admitted the statement or so-called written confession of the defendant Opper, Exhibit 41. It is the view of the Court, without going into any lengthy discussion of this matter, which the Court feels would be entirely unjustified, that the question here urged by counsel for defendant Opper, has been fully and completely answered by the Court of Appeals of this Circuit, in the case of Anderson v. U. S., 124 Fed. (2) page 58, where on page 59, as shown by the Sixth headnote, the court held: "A confession if freely and voluntarily made is the most satisfactory type of evidence and it is deserving of the highest credit inasmuch as it is presumed to flow from the strongest sense of guilt. Therefore, it is admitted as proof of crime to which it refers."

Counsel for defendants have attempted to distinguish the Anderson case from the instant case because of the fact that in the Anderson case it was shown that an explosion had taken place. But the Court of Appeals makes no such distinction in its decision, because as shown on page 66, the Court of Appeals say, "If there is in the evidence in addition to the confessions circumstances which although they may be susceptible of an innocent construction are nevertheless calculated to suggest the commission of the crime above, the explanation of which the confession of the particular defendant furnishes the key, the case cannot be taken from the jury for failure to show corroboration. All that is required is that there be such corroborative circumstances as will, when taken in connection with the confesions, establish"—What? "the corpus delicti beyond a reasonable doubt."

In the Fifteenth Headnote it says, "In prosecution for conspiracy to injure property of Tennessee Valley Authority Corporation by destroying corporation's transmission lines by explosives, confession of defendants were sufficiently corroborative so as to be admissible by one of the defendants purchase of dynamite and a fuse near the place where the explosion occurred and similarity of wrappers with those used on dynamite purchased by defendant and finding of auger in the river where another defendant said in his confession the auger was thrown, and testimony of accomplice that another defendant gave accomplice a rifle with which to stand guard." Now, it was on that knd of statement of fact that the Court of Appeals said what they did say.

It is agreed by defendants' counsel that the Anderson case is of controlling importance here. On page 2 of their joint brief they say, "It has happeared, from earlier arguments had herein, that the government lays much stress upon the decision rendered by the 6th Circuit Court of Appeals in the case of Anderson v. U. S., 124 Fed. (2), 58, 1941. Defense counsel acknowledge that the Anderson case, being expressive of the rule adopted by the 6th Circuit, is of controlling importance in a determi-

nation by this Court of the issues presented by defendants' motion to strike." And in their brief, counsel for defendants, as they did in the oral argument yesterday dwelt upon what is supposed to be—is known as the strict rule and the liberal rule. They say, "It is, we believe, substantially agreed between government counsel and defense counsel that the so-called 'strict rule' requires proof, independent of a confession, of every element constituting the corpus delicti before the confession, itself, becomes admissible in evidence."

"In expressing their understanding of the so-called 'Liberal Rule' government counsel have stated that under such 'Liberal Rule' all that is required is that there should be corroborative evidence tending to prove the facts embraced in the confession." But so far as this Court is concerned, it is not concerned here either with the so-called strict rule or the so-called liberal rule, because it is the view of the Court that nothing could be plainer than the statement made by the Court of Appeals of this Circuit in the Anderson case, as shown on page 66, 124 Fed. (2), to the effect that "All that is required is that there be such substantial corroborative circumstances as will, when taken together in connection with the confessions"—as I said before.—What?—"establish the corpus delicti beyond a reasonable doubt."

Now, I don't care whether that comes under the strict rule, liberal rule or no rule, that is what the Court of Appeals of this Circuit has said and that is the law that is binding on this Court. I understand that to mean, so there won't be any question about it, just exactly what it says; that is to say, that if there is substantial corroborative evidence, such substantial corroborative circumstances as will, when taken in connection with the confessions establish the corpus delicti beyond a reasonable doubt. It does not mean, according to the claim of the defendants, that you must establish that by independent evidence.

I don't think you have to go into the question of what the liberal rule and the strict rule requires; that is what

is required in the 6th Circuit, in my opinion. I think it is very plain to my mind, very simple. Perhaps it is because I think it is simple that probably it is confusing and I don't quite understand it. But I don't see how you can read the English language to be any different than what appears to be right there.

Having read thoroughly, and I did read them, Gentlemen. I can't say I burned the midnight oil because we don't use oil at our house, but I did burn the midnight electricity. Having read thoroughly, the entire brief of counsel for defendant Opper, the Court is of the opinion and so finds that the motion of defendant Opper in the Alternative, to enter a judgment of acquittal as to him is not well taken, and that it should be, and it is, overruled.

On yesterday, May 26, 1952, there was filed on behalf of defendant Hollifield a motion wherein defendant Hollifield "moves the Court to dismiss the indictment in the above cause as to the defendant Hollifield or in the alternative moves the Court to enter a judgment of acquittal as to the defendant Hollifield in the above entitled case."

As the record now shows exactly the same kind of motion, word for word, was filed on behalf of defendant Opper, in considering the motion of defendant Opper, the Court considered only the testimony having reference to the defendant Opper, excluding entirely any statements that may have been made by defendant Hollifield, either orally or in writing, in arriving at its conclusion.

A part of the motion of defendant Hollifield, to-wit, "To dismiss the indictment in the above entitled case" has been passed upon by the Court and in keeping with his former ruling or in any event ruling now, the Court is of the opinion and so finds that the motion of defendant Hollifield to dismiss the indictment is not well taken, that it should be, and it is overruled.

With his motion in the alternative, defendant Hollifield has filed a memorandum and in addition thereto joins in with the memorandum filed on behalf of his co-defendant William J. Opper, to the extent that he is able to do so in the evidence.

The record will show that the Court has just now ruled on the motion of the defendant Opper. The Court deems it unnecessary to here repeat what has already been said with regard to the alternative motion of defendant Opper.

Based entirely upon the evidence insofar as it relates to the defendant Hollifield and in no way giving any consideration whatsoever in passing on defendant Hollifield's motion to any evidence or testimony with regard to defendant Opper, the Court is of the opinion that the testimony is overwhelmingly in the case, to such an extent that it is not only justified, but required to submit this case, so far as the defendant Hollifield is concerned, to the jury.

The Court is of the opinion and so finds that the motion of defendant Hollifield for dismissal of the indictment or in the alternative for a judgment of acquittal is in each respect not well taken and that in each respect it should be, and it is, overruled.

Now, Gentlemen, inasmuch as these motions were filed at my request, I may say, but solely for the purpose of keeping the record straight,—inasmuch as these motions were filed yesterday in the clerk's office, I would suggest that counsel for the government prepare and submit to defendants' counsel the proper entries in accordance with the decisions of the Court just made. After they have been submitted to defendants' counsel and counsel agree all around as to the form, if you do, then they can be submitted to the Court for its approval. In that way we will complete the record in the clerk's office, as well, of course, as in the transcript here. In other words, what appears here in this transcript, of course, doesn't always appear on the Appearance Docket. So the Appearance Docket may show that these motions are still pending, whereas they have been disposed of. The orders that I have just now mentioned will take care of their disposition as counsel understand.

Now, Gentlemen, as far as the Court is concerned, we are ready to call in the jury and proceed with further evidence in this case.

You may bring in the jury.

Thereupon the jury returned into the court room and the following proceedings were in the presence and hearing of the jury.

The Court: Members of the Jury. I am glad to see you all here. Now we are about to proceed, Members of the Jury, in a little while with the taking of such testimony as the defendants may wish to offer in this case. I have been requested by counsel, however, for reasons of their own and good reasons, as I think, that I now recess until 2 o'clock this afternoon, at which time they will be prepared to go forward. I had you come in so we would be assembled again and get started. I will now excuse you and return if you please at 2 o'clock this afternoon, when we will continue the taking of further evidence in the case.

Adjourn court until 2 o'clock.

Thereupon the further proceedings in the trial of this cause were adjourned until 2 o'clock of the afternoon of the same day

Afternoon Session.

Tuesday, May 27, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

Mr. Kelley: Ready to proceed, your Honor?

The Court: Ready to proceed whenever counsel are ready.

And thereupon

LIEUTENANT FREDERICK MOSS, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Will you please state your full name?

A. Frederick Moss.

Q. Your rank?

A. Second lieutenant.

Q. In what?

A. U. S. Air Forces, Medical Service Corps.

Q. You are the same gentleman who appeared here earlier as a government witness and were sworn to testify in this case?

A. That is the truth, sir.

Q. Lieutenant, during the course of my cross-examination, while you were a witness, I presented to you what was marked and what is marked as Defendants' Exhibit G for identification, and ask you to identify it. Do you recall that?

A. Yes, sir, I do.

Q. And for purposes of refreshment, would you identify it now?

A. Yes, it has my signature.

Q. And it is an R and R.

A. That is true, sir.

Q. Directed from—

A. From me, from MCREXD-8 to MCREXD-7, Attention Mr. Hollifield.

Q. That was prepared upon your dictation and initiation and signed by you?

A. That is right.

Q. And forwarded to the office to which it is directed?

A. Yes, sir.

Mr. Kelley: We offer in evidence Defendants' Exhibit G.

Mr. Aug: Your Honor, we will object to the admission of Defendants' Exhibit G, for the reason that there has been no relevancy established to this case. There is nothing apparent on the face of the instrument that has anything to do with the facts or anything previously in evidence in this case.

The Court: I will overrule the objection. It may be admitted in evidence, marked as Defendants' Exhibit G in evidence.

Thereupon said R and R was admitted into evidence and marked as Defendants' Exhibit G.

Mr. Kelley: May I read the exhibit to the jury?

The Court: Yes.

Mr. Kelley: I will omit the printed portions and merely read what has been typewritten on the exhibit, if that is agreeable.

Mr. Aug: All right.

Mr. Kelley: The printed word "Subject" followed by the typewritten words "Goggles, Ski, for Survival Kit. To MCREXD-7, from MCREXD-8, dated 6 February 1951. Comment No. 1. Attention: Mr. R. G. Hollifield. Subject item has been tested and satisfactorily meets the optical requirements as stipulated in Specification No. JAN G-1134." There is a pen and ink signature, underneath that in typewriting "J. W. Heim, Chief, Physiology Branch, Aero Medical Laboratory." Beneath that, in typewriting the word "Concurrence." Below that three signatures, the first one being F. Moss; the second O. T. Strand; the last one J. W. Heim. After each of those signatures in pen and ink appears "MCREXD-8."

Q. To clear up that point, Lieutenant, it appears that this R and R was directed to MCREXD-7. What office do those symbols designate?

A. That is the Medical Specialties Branch.

Q. Medical Specialties Branch?

A. Yes.

Q. And the Land Survival Unit is a unit of that Medical Specialties Branch?

A. That is right.

Q. Doesn't the 7 actually refer to the Land Survival unit of that branch?

A. I don't think so.

Q. And what is the meaning of the letters "MCREXD-8" which are after the printed word "From"?

A. That is Physiology Branch.

Q. That is your branch?

A. Yes, sir.

Q. So this would be from your branch, Medical Specialties Branch?

A. Yes, sir.

Q. I failed to read over to the right in typewriting are the initials "FM/pal." Beneath that "2-8242." Beneath that "Building 29." Those are your initials, "FM" over in the right corner?

A. That is right.

Q. Did you write in longhand the matters which appear on this R and R?

A. Yes, sir.

Q. And having written it in longhand, did you turn over that longhand writing to a secretary or typist?

A. Yes, sir.

Q. And she then typed this Exhibit G?

A. Yes, sir.

Q. And in so doing put your initials, then a slant and then her initials; is that right?

A. That is right.

Q. Was it customary in your branch, when the person who initiated, that is, wrote out in longhand the R and R, to always put his initials there as the initiator?

A. That is right.

Q. And was it also necessary under the typewritten word "Concurrence" for the man who had initiated the R and R

whose initials appear on it, to first sign his name under the word "Concurrence"?

A. Yes, sir.

Q. The fact that a signature of a person appears first under the word "Concurrence" would be indicative of the fact that he had prepared it?

A. Yes, sir.

Q. That is to say, dictated it or wrote it out?

A. Yes, sir.

Q. Now, the subject of this R and R is said to be "Goggles, Ski, for Survival Kit". The ski goggle was a component part of the E-1 kit, was it not?

A. I think so.

Q. You aren't sure?

A. No. I think so. I don't know for sure. I wasn't familiar with what goggle went into which kit.

Q. Do you know who the contractor was producing the E-1 kit?

A. No.

Q. Do you know who the contractor was producing the D-1 kit?

A. I do now.

Q. You didn't at the time we are speaking of, 1950 and 1951?

A. No.

Q. You state here that ski goggles had been tested, satisfactorily meet specification. Did you have the samples in your possession which were actually tested?

A. Yes, sir.

Q. From whom did you obtain the samples of ski goggles that you had tested?

A. Somebody in Medical Specialties.

Q. Don't you know who?

A. I don't know exactly who brought them over or if I picked them up.

Q. Do you know where they came into your possession that time?

A. I was either over in Medical Specialties or in my own office.

Q. You don't know where?

A. I am not sure of the exact place.

Q. What did you do with the samples after you had taken them into your possession, the ski goggles?

A. I did my part of the test that we have equipment for.

Q. Tell us what you did.

A. Examined them for refracted power and distortion and found them to be acceptable and then sent them down to Materials Lab.

Q. Now you sent them to Materials Lab. Did you prepare a work order in connection with your request that they do some testing?

A. Yes.

Q. Have you ever searched your records to see if you have a copy of that work record?

A. I think I do.

Q. Did you find one?

A. I think so.

Mr. Kelley: Does the government have a copy of that work record? (After government counsel produced copy of work order:) Mark this U.

Thereupon said work order was marked for identification as Defendants' Exhibit U.

Q. I show you what has been marked as Defendants' Exhibit U for identification and ask whether or not you can identify it.

A. My signature.

Q. Can you identify it?

A. Yes.

Q. What is it?

A. It is a work order from the Vision Unit to Materials Laboratory, Physics Branch. Want me to read it?

Q. No. Requesting a test?

A. Requesting a test, a spectral photometric test of the goggle, of the lenses.

Q. What is its date?

A. 24 January 1951.

Mr. Kelley: I offer it in evidence.

Mr. Aug: If your Honor please, we object to the introduction of this document in evidence and at the same time I would like to renew my objection concerning the February 6th memorandum. I would like to call the attention of the Court to the evidence which has been produced by this witness. He said he didn't know anything about the component parts of the E-1 kit, he didn't know anything about the component parts of the D-1 kit; he doesn't know who gave him the goggles to make the inspection and in the opinion of the government there has been no relevancy attached to this February 6th memorandum and therefore none attached to this work order and we request both be stricken.

The Court: I will overrule the objection. You may cross-examine him about those things, if you wish, of course, if he knows anything about them. But I will let it go into evidence. He knows nothing about it, other than the fact his signature appears on there.

Mr. Kelley: May I read the typewritten portions of this exhibit to the jury?

Thereupon said work order was admitted into evidence and marked as Defendants' Exhibit U.

Mr. Kelley: It appears to be a printed form with certain typewriting filled in. Under "1." in printing "Participating Comp." typewriting "MCREXM Attention Mr. Handmacker. Project Title, Goggles and Sun Glasses." Below that, filled in "1 B. 19264." Up in the right-hand corner "Project No. S-690-11". Beneath that "Date, 24 January 1951." Beneath that "Priority 3-A." Under "Description of work, To cover necessary time and material for comparison of the optical characteristics of the submitted lenses with Specification No. JAN-G-1134 by spectrophotometry or other stipulated methods." Below to the left "Project Engineer (Signature) Frederick Moss." To the right of that "Branch Chief" signed by "J. W. Heim";

to the right of that "Approved R. L. King, Chief, Service Branch, for W. A. Carlson, Colonel."

Q. Now, in connection with Defendants' Exhibit U in evidence, did you, perso. ally, take that work order and the samples to the Materials Lab.?

A. I don't remember. If I can see that it might help. (After looking at Defts' Ex. U:) Probably carried them down because it says "Submitted".

Q. Personally?

A. Probably.

Q. Now, do you recall when you were on the stand, called as a witness by the government, testifying to a conference held in your office, which you said was attended by yourself and Mr. Strand of the Vision Lab., your office, and was attended by Mr. Hollifield, Mr. Murray, Mr. Opper and an unknown man that we refer to as Mr. X? Now on what date would you say that conference was held?

A. Not the exact date, no.

Q. Can you tell us now what date it was?

A. I don't recall the exact date.

Q. I show you, Lieutenant, Government's Exhibit 28-A in evidence. I believe you have had that in your possession on the witness stand before.

A. Yes, sir.

Q. Now that reads, does it not, in the first paragraph, "Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch"?

A. Yes, sir.

Q. This is dated January 25th; is that right?

A. Yes.

Q. And refers to an earlier conference mentioning four men only. Right?

A. That is right.

Q. That conference could, of course, have taken place on the day before, which would have been the 24th of January?

A. That is right.

Q. The 24th of January is the date that you made out this work order?

A. That is right.

Q. Are you refreshed in any sense by that fact that you made out a work order as to ski glasses on the 24th in connection with when you actually held the conference in your lab., which was prior to the 25th of January?

A. No, it doesn't ring a bell.

Q. Having reference to Government's Exhibit 26 which you earlier identified, that is an R and R from the Land Survival Unit, to your—the Vision Lab., is it not?

A. Yes, sir.

Q. Requesting sun glasses be tested?

A. Yes.

Q. And as the result of this request that you test sun glasses, you prepared a work order, that we had here in court, and you identified before, and sent the sun glasses down to Materials Lab.?

A. Yes.

Q. So, as respects the sun glasses you took action, that is to say, prepared the work order and sent the samples down to the Materials Lab., as a result of having received from the Land Survival Unit an R and R asking you to do so?

A. Yes.

Q. Now, as respects the ski goggles and as respects the work order which you have in your hand in relation to ski goggles, what led you to request a test in that instance? Did you receive an R and R from Land Survival?

Mr. Aug: Your Honor, I rise to make this point: We are not quarreling with the questions and answers which are being produced, but we are quarreling with the form in which they are put. This is in the nature of cross-examination instead of direct.

The Court: I will sustain the objection as to the form of the question. He is your witness now.

Mr. Kelley: Is it the suggestion I am leading the witness? Is that the objection?

The Court: I think the question is improperly put; I think it is argumentative.

Mr. Kelley: I withdraw it and proceed.

Q. Lieutenant, did you receive any written communication from the Land Survival Unit, which caused you to issue that work order?

A. Not that I can recall.

Q. What, if any, form of communication did you receive from the Land Survival Unit which caused you to issue that work order?

A. Which order are we talking about?

Q. The work order in your possession, Defendants' Exhibit U.

A. Probably verbal. It must have been verbal.

Q. You don't know whether it was verbal or written?

A. No.

Q. You don't know who sent it to you?

A. Not positively, no.

Q. Have you searched your records to see if you could find such and R and R?

A. Yes, sir.

The Court: Did you ask him to?

Mr. Kelley: I asked whether he did.

The Court: I know. Did you ask him to and he didn't do it? I shall direct him to do it. If you didn't, that is another matter.

Q. Do you recall that you and I conferred in this building earlier and we discussed the question of Defendants' Exhibit G, which is your R and R of February 6th? Do you recall my asking you then if you had copies of an R and R connected with that from the lab.?

A. Yes, sir.

Q. In connection with that, have you searched to see if you had?

A. Yes.

Q. Have you found anything?

A. No.

Q. Did you ever receive any written communication from the Materials Lab. where you had sent these ski goggles for test with the work order Defendants' Exhibit U?

A. Yes.

Mr. Kelley: Mark it V.

Thereupon a test report was marked for identification as Defendants' Exhibit V.

Q. I show you, Lieutenant, what has been marked for identification as Defendants' Exhibit V. Can you identify that?

A. Yes.

Q. What is it?

A. It is a Materials Lab. Rest Report, prepared by Handmacher and addressed to the Vision Unit.

Q. That is your unit?

A. Yes.

Q. Does it relate to the ski goggles which you had sent to the Materials Lab. for test along with your work order Defendants' Exhibit U?

A. Yes, it does.

Q. Does it represent their report of the test?

A. Yes, it does.

Mr. Kelley: I want to offer this in evidence.

Mr. Aug: No objection.

The Court: It may be admitted and marked as Defendants' Exhibit V in evidence.

Thereupon said test report was admitted into evidence and marked as Defendants' Exhibit V.

Mr. Kelley: Likewise appears to be a printed form. I will read the typewritten portions. Upper righthand corner, "MCREXM6/VJH/mms. Goggle, Ski-Mountain. Report Number MCREXM6-Mc51-27. Submitted by MCREXD84. Date 15 March 1951. Spec. Number JAN-G-1134.

"A. Purpose:

"1. To determine conformance of one set of lenses to the requirements of the referenced specification for Type 2 goggles.

"B. Factual Data:

"2. The set of lenses, Type 2, were submitted 24 January 1951 without identification and were assigned Physics Branch Serial Number 19264-1 and 19264-2.

"3. The optical tests conducted together with specification requirements and results obtained on the lenses are tabulated in Table 1.

"C. Conclusions:

"4. The set of lenses submitted conforms to the requirements of Specification JAN-G-1134 for Type 2 goggles, with respect to the optical properties tested.

"D. Recommendations:

"None, data merely submitted."

Signed by Mr. Handmacher, Mr. Sorte. Concurred in by W. R. Koch.

On the back "Table 1—Optical Data."

Q. Now, Lieutenant, this report of the Materials Lab. test is not dated until March 15, 1951. That is Defendants' Exhibit V. Whereas Defendants' Exhibit G is dated the 6th of the previous month, that is, the 6th of February 1951. You prepared this R and R, Exhibit G, stating that the goggles had been tested and were satisfactory and met the spec. How do you account for that?

A. Verbal approval.

Q. From whom to whom?

A. From Handmacher to me.

Q. You received verbal approval from Handmacher reflecting a favorable outcome of his tests, which is written out on Exhibit V, dated March 15th, at an earlier date than March 15th?

A. That is right, prior to the issuance to this R and R.

Q. It would be prior to the 6th of February?

A. That is right.

Q. So there was a question of time only that Exhibit V caught up with you?

A. That is right.

Q. You received verbally essentially the same information as is in Defendants' Exhibit V?

A. That is right.

Q. And on the basis of that verbal information you issued Defendants' Exhibit G to Mr. Hollifield, telling him they had been tested and that they met the specifications?

A. That is right.

Mr. Kelley: Mark this W.

Thereupon a pair of goggles was marked for identification as Defendants' Exhibit W.

Q. Lieutenant, we have just been discussing Defendants' Exhibit G, which is an R and R to Mr. Hollifield from you stating that the ski goggles had been tested, satisfactorily met the requirements of the spec. Are you aware of any test that was ever made at any time by your lab., or the Materials Lab. at your request, the results of which were that the ski goggles were not within the spec.?

A. No.

Q. Any tests you know of, they were always found to be within specifications, ski goggles?

A. Yes.

Q. I show you what has been marked for identification as Defendants' Exhibit W. Would you inspect them? They appear to be a pair of goggles.

A. Yes, they appear to be a pair of goggles.

Q. Having looked at them, state whether or not you observe any difference between the goggles Defendants' Exhibit W and the sun glasses which you had before you during your conference in your lab. attended by yourself, Mr. Strand, Mr. Hollifield, Mr. Murray, Mr. Opper and Mr. X.

Mr. Aug: We will object, if the Court please. The witness has been given a goggle. We don't know where it came from or who it belongs to.

The Court: I understand.

Mr. Kelley: My question was whether he observes any difference between these and the sun glasses that they had before them at that time.

The Court: I know. But he has already testified, all the evidence in the case shows that when these goggles, sun glasses, whatever they were, came to this place, they were tested not only the way they look but for visibility, for the light that goes through the glass, all those different things. Of course, that is a copy he is laying on the stand here. I suppose you could bring in lots of copies and say, "Sure they look alike." That is not the point. What we are talking about here was a certain ski goggle or sun glasses, whichever they were that were over there that day. I will sustain the objection.

Mr. Kelley: I will lay a further foundation.

Q. When you were on the stand before, Lieutenant, I asked you, did I not, whatever became of the sun glasses you had in front of you and were inspecting at that conference and you told me you didn't know where they were, and you haven't any idea where we could find them now, have you?

A. No.

Mr. Kelley: I would like to make the offer of proof. I have put a question to the witness. Obviously it is im-

possible to locate the sun glasses that were before them at that conference. Now I have asked this witness to look at Defendants' Exhibit W and asked him if there is any difference between the glasses he saw that day and these, your Honor, and I would like to make an offer of proof. The answer will be that they appear to be the same; there is no difference.

The Court: I will sustain the objection. While they may look alike, we don't know. These things were all subjected to some kind of test out there that have been testified to in this case. They may look very much like them and they may be entirely different.

Mr. Kelley: The purpose, your Honor—

The Court: I will sustain the objection.

Mr. Kelley: I would like to make an offer of proof at this time.

(Out of the hearing of the jury.)

Mr. Kelley: Defendant offers to prove by the witness Lieutenant Moss, through the question just objected to and said objection being sustained, and represents that if the witness were permitted to answer said question he would testify that the goggles identified as Defendants' Exhibit W appear to be identical and appear to be a facsimile of the sun glasses which were examined and discussed in the conference, in the Vision Lab. attented by the witness Moss, Strand, Hollifield, Murray, defendant Opper, and an unknown man shortly prior to January 25, 1951. It is stated that this testimony is relevant and material and competent since at a later stage of this trial defense counsel desire to submit Defendants' Exhibit W to the witness Hanselman, who will testify that between ten and fifteen thousand sun glasses were government furnished and government packed and were sent to the field of Air Force operations and put to actual use without any complaint of unsuitability and that the ten thousand plus

sun glasses so packed and furnished by the government were identical to the sun glass identified as Defendants' Exhibit W and consequently identical to the sun glass which was used by the parties in the conference aforesaid, which sun glasses were the subject of discussion at said conference. The purpose of this proof is to establish the truth of the fact as allegedly stated by Hollifield at said conference that some 15000 identical sun glasses had previous to said conference been government furnished and government packed and used in military operations with complete success and without any suggestion that such goggles were unsuitable for the purposes for which supplied to the Air Force.

(In the hearing of the jury.)

Mr. Kelley: That is all, your Honor. You may have the witness.

The Court: Any cross-examination?

Cross-Examination, by Mr. Aug.

Q. Lieutenant Moss, at the time the general time referred to in this February 6th memorandum, at that time, did you know anything about the components of the E-1 kit?

A. Not that I can recall, no.

Q. Did you know anything specifically about the requirements of the specifications for goggles in an E-1 kit?

A. I don't think so.

Q. At that time, did you know anything about the component parts of a D-1 kit?

A. No, not the component.

Q. Did you know anything specifically about the requirements of the specifications for the goggle that went into a D-1 kit?

A. No, I don't think so.

Q. Did you know anything about contract 16916 which is in evidence in this case?

A. No, sir.

Q. Did you know anything about contract 18136?

A. No, sir.

Q. Did you know anything about contract 17438?

A. No, sir.

Q. You didn't know any of the terms or provisions or requirements of those contracts?

A. No, sir.

Q. Now, you did come into possession of a goggle which became the subject of a test which you reported on on February 6th; is that correct?

A. Yes, sir.

Q. Where did you get that goggle?

A. From somebody in the Medical Specialties.

Q. Do you know who gave you that goggle?

A. Not for sure, no.

Q. You don't know for sure. In other words, the goggle that was the subject of the February 6th memorandum, was that a sun goggle or ski goggle?

A. It was a ski goggle.

Q. And I think you stated that Lieutenant Handmacher had given you a report verbally before his formal written report came through; is that correct?

A. Yes, sir.

Q. I will hand you Defendants' Exhibit V and ask you to state whether or not that is the formal report of Lieutenant Handmacher with respect to the goggle that was the subject of that February 6th memorandum.

A. Yes, sir.

Q. I will ask you to examine it, if you will, please, with particular reference to the mention of the type goggle concerned. Now, what type goggle does that memorandum have reference to?

A. Type 2 goggle.

Q. And what does the report state with respect to its meeting specifications?

A. That it meets the specifications for Type 2 goggle.

Q. Does that, in your opinion, Lieutenant, mean that it doesn't meet the specifications for Type 1 goggle?

A. Yes.

Q. Now, are you familiar with the basic difference between the Type 1 goggle and Type 2 goggle; that is, I have reference to the ski goggle which is the subject of this memorandum?

A. Yes, sir.

Q. Would you tell the jury what the basic distinction is between the two goggles?

A. Type 1 goggle consists of two lenses, each lens is two pieces of glass with a lamination of plastic between them. The type 2 is one piece of glass, each lens, piece of glass heat treated.

Q. With respect to the probability of breakage, is there a distinction between the Type 1 and Type 2 goggle?

A. Yes. The Type 1 goggle is much like the shatterproof glass. It doesn't shatter. An impact would shatter the glass so that it all adheres to the plastic and doesn't fly out. The heat-treated glass on impact, the glass breaks outward.

Q. The heat-treated glass, you mean the Type 2 glass.

A. Type 2 glass.

Q. It is your conclusion that the conclusion of this memorandum which said this was a Type 2 goggle, in effect said the glass properties with respect to breakage of the goggle were such that it would break out; is that correct?

A. That is right.

Q. Did you tell that to Mr. Hollifield?

A. Yes.

Q. Did you do anything else with respect to showing Mr. Hollifield where this was a Type 2 goggle?

A. Yes, sir.

Q. Will you tell the jury what that is?

A. During this time, I can't fix the date, I went over to Medical Specialties Branch and some question about whether it was Type 1 or Type 2 goggle came up. To make sure it was not laminated we smashed the lens with a hammer or a heavy instrument and it was a Type 2 goggle.

Q. What happened to the glass when you smashed it with a hammer, Lieutenant?

A. It shattered.

Q. And that identified it as what type of goggle?

A. Type 2. You could also see there was no lamination.

Q. And Hollifield knew this?

A. Yes.

Q. And he knew this around the time of your February 6th memorandum?

A. Yes, sir.

Q. Is this the only test of ski goggles that you participated in, Lieutenant, to your recollection?

A. I think another pair might have been tested. I don't remember offhand.

Q. The answer to the question is, you don't remember; is that correct?

A. That is right.

Mr. Aug: No further questions.

Redirect Examination, by Mr. Kelley.

Q. Lieutenant, I show you what has been received in evidence as Government's Exhibit 18, identified as the specifications covering the goggles in the E-1 kit, in the Cappel-MacDonald contract, which specifications are numbered JAN-G-1134. Showing you Defendants' Exhibit G, which is the R and R you prepared saying that you had the ski goggles tested and were satisfactory. What spec. did you test against?

A. JAN-G-1134.

Q. The same spec.?

A. That is right.

Q. Do you know or don't you that both Type 1 and Type 2 goggles have been equally approved for use in the E-1 kit regardless of type?

Mr. Aug: Objection.

A. No, sir, I didn't know that.

Q. I believe you have said, Lieutenant, that you are an optometrist?

A. That is right.

Q. You are the only optometrist in the Vision Lab. Mr. Strand is not an optometrist?

A. At the time I was the only one.

Q. During the course of this investigation, at any time, did you ever state to an F. B. I. agent as respects the sun glasses you were examining in the conference just prior to the 25th of January in the Vision Lab.—did you ever make the statement to an F. B. I. agent that you, personally, would rather use the sun goggles furnished by Mr. Opper in extremely cold conditions?

A. I don't remember exactly. I might have and I might not have. I don't recall.

Mr. Kelley: That is all.

Mr. Aug: We are through with the witness, your Honor.

The Court: That is all for the time being. We will see you again soon. By the time you get back you will be a colonel, if we keep on.

NORMAN K. HANSELMAN, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Your full name is Norman K. Hanselman?

A. Yes, sir.

Q. And where do you reside, sir?

A. 72 Woods Drive, Dayton, Ohio.

Q. And what is your present occupation?

A. I am unit chief of the Land Survival Unit, Parachute Branch, Equipment Laboratory, at Wright Field.

Q. What was your occupation during the month of October of 1950?

A. I was project engineer in the Land Survival Unit, working on land survival kits.

Q. And the Land Survival Unit which is a part of the Medical Specialties Branch?

A. Yes.

Q. Which in turn is a part of the Aero Medical Laboratory?

A. Yes, sir.

Q. At Wright Field?

A. Yes, sir.

Q. And as a project engineer in the Land Survival Unit, the unit chief at that time was whom?

A. Robert Hollifield.

Q. That is Mr. Hollifield, defendant in this case?

A. Yes, sir.

The Court: He was unit chief?

The Witness: Yes, sir.

Q. Are you acquainted with a Mr. Cline who is employed at Cappel-MacDonald and Company?

A. Yes, sir.

Q. During the fall of 1950, will you state whether or not Mr. Cline came out to the Land Survival Unit with samples of some components?

A. What was the date again, sir?

Q. During the fall of 1950.

A. Yes, sir.

Q. And was there a meeting had at which you were present, Mr. Hollifield was present and Mr. Cline was present, possibly others, at the offices of the Land Survival Unit, in the fall of 1950?

A. Yes, sir.

Q. Do you recall at that time what samples—samples of what nature were brought to the office by Mr. Cline?

A. Yes, sir.

Q. Would you state what you recall as to that?

A. There was the compass, mirror and goggles.

Q. Those were ski goggles?

A. Yes, sir.

Q. The E-1 kit calls for ski goggles among its components, does it not?

A. Yes.

Q. It was on the contract for production in E-1 kits that was awarded to Cappel-MacDonald and Company. Correct?

A. Yes, sir.

Q. Now do you recall anyone else present at that meeting other than yourself, Mr. Hollifield and Mr. Cline?

A. I don't recall anybody else being present. There may have been somebody else present.

Q. Will you state to the Court and the jury what was said during that conference with respect to the samples, that is, compass, mirror and ski goggles, that Mr. Cline brought out?

A. I was there during part of the conference. It was late in the afternoon. The part I remember specifically is the mirror which Hollifield rejected because it was a mirror used during the last war and there had been a better mirror designed and we were anxious to get that in the kits, and also on the ski goggles they were rejected because they didn't have any spare lenses, according to the specifications that are supposed to be furnished.

Q. That is an extra pair of plastic lenses?

A. Yes, sir.

Q. That should go along with the set of ski goggles?

A. Yes, sir.

Q. That rejection took place while Mr. Cline was there with respect to the sample goggles he had, is that right? There didn't appear to be an extra set of green lenses.

A. Yes, sir.

Q. You recall the next day that Mr. Buchsbaum came to the Land Survival Unit offices and discussed in your presence and in the presence of Mr. Hollifield ski goggles, and the question of an extra plastic lens in the ski goggles?

Mr. Aug: Now, your Honor, Mr. Kelley has been cross-examining witnesses for the past two and a half weeks. I think it has become a habit. I would ask the Court to

instruct Mr. Kelley to put the questions remembering the witness was called by him.

Mr. Kelley: I think that is altogether true. I have sort of fallen into the habit of cross-examination.

The Court: I will sustain the objection.

Mr. Kelley: Counsel is altogether correct.

Q. Do you recall a conference following the meeting with Mr. Cline at which Mr. Buchsbaum was present?

A. Yes, I do.

Q. And who else was present at the time Mr. Buchsbaum was there?

A. The only people that I remember are Hollifield, myself and Buchsbaum. But there were other people in the office at the time. I couldn't name them.

Q. You have named all that you are sure participated in the conference?

A. Yes, sir.

Q. Now will you relate to the Court and jury what was said and by whom during that conference attended by Mr. Buchsbaum with respect to goggles?

A. Mr. Buchsbaum brought the goggles in and pointed out the pair of goggles he had did have the extra lenses in it and Hollifield approved the goggles.

Q. We are speaking now of ski goggles, are we?

A. Yes, sir.

Q. Did you see an extra lens at that conference?

A. Yes, sir.

Q. How did you happen to see it? What took place? What was done?

A. Mr. Buchsbaum showed them to us.

Q. What did he do? How did he show them to you? Tell us what he did.

A. He took them out of the pocket that is contained in the case for the plastic lens and showed them to us and Hollifield said: "Well, in that case, they are o. k."

Q. Until Mr. Buchsbaum reached into this case and pulled out the extra plastic lenses, did you know that they were there?

A. No.

Q. Until he demonstrated it?

A. He demonstrated it, yes.

Q. Now was anything said then concerning the suitability of the goggles by Mr. Hollifield?

A. He said they were satisfactory.

Q. Was there anything else said that you remember about the goggles then at that conference?

A. Yes. Hollifield stated that he would have to call somebody. I am fairly certain that he said Cappel-MacDonald. I didn't hear him call—make a call, but he made the statement to Buchsbaum that he would have to call either Cappel-MacDonald or the contracting officer, and Buchsbaum said: "Why?"

Q. Is that all Buchsbaum said, just "why"?

A. He said: "Why?" He was the one that brought it to the attention of—he was the one that brought the item in and Hollifield said he would have to be fair to everybody.

Q. Now, at that time, Mr. Buchsbaum was a prospective bidder on the E 1 kit, was he not?

A. Yes, sir.

Q. And so was Cappel-MacDonald?

A. Yes, sir.

Q. They had not filed their bids yet. You say Mr. Hollifield said he had to be fair to all bidders; is that it?

A. Yes, sir.

Q. Do you know whether or not Mr. Hollifield made a call to Cappel-MacDonald?

A. No, I don't know whether he made a call or not.

Q. You weren't there if one was made. None made in your presence; is that it?

A. I could have been in the office but I didn't—

Mr. Ang: He said he didn't know.

Q. No call was made in your presence; is that right?

A. By "presence" you mean in the same office?

Q. To your knowledge.

A. To my knowledge.

Q. Yes.

A. That is right.

Q. Mr. Hanselman, I show you what has been received in evidence marked as Government's Exhibits 26, 27, 28-A and 28-B. Will you examine those documents and state whether or not your initials appear on any of them?

A. My initials appear on the one dated 16th of January.

The Court: What is the exhibit number, please?

Mr. Kelley: 26, your Honor.

Q. Now, Exhibit 26 has been identified as an R and R dated 16th of January, 1951.

A. Repeat the question.

Q. I am referring now to Government's Exhibit 26. That is an R and R dated the 16th of January, 1951.

A. Yes, sir.

Q. It is from whom?

A. It is from the—

Q. What does it say?

A. MCREXD-7 to MCREXD-8, Mr. Strand.

Q. What does that mean?

A. That means from the Land Survival Unit to the Vision Unit.

Q. Now your initials appear about the center of the page, over to the right, in capital letters "NKH" followed by a slant, to the right of that, in small letters, "hgs". Correct?

A. Right.

Q. And NKH are your initials?

A. Yes, sir.

Q. Was there any other person connected with the Land Survival Unit whose initials were NKH, other than yourself?

A. No, sir.

Q. Who is the person whose initials are "bgs"?

A. Barbara Sensenbaugh. She was the branch stenographer.

Q. Now the Land Survival Unit was a unit or part of the Medical Specialties Branch; is that right?

A. That is right.

Q. And she was secretary or typist for the branch?

A. That is right.

Q. Did the Land Survival Unit have any typist?

A. No, sir.

Q. All the typing that was done in that unit was that done by this young lady?

A. Yes, sir, except when she was off somebody else done it.

Q. These R and Rs are printed yellow sheets, are they not?

A. Yes, sir.

Q. What was the custom and rule in the Land Survival Unit during January of 1951 as to the method of preparation of an R and R? Let us say if you in your official capacity desired to prepare one, tell the Court and jury step by step what you do.

Mr. Aug: We will object, if the Court please. We are concerned with Memoranda and R and Rs here that have his initials. I don't see what relevancy there would be in connection with some other instrument.

The Court: Did you make these out?

Mr. Kelley: If your Honor please, I am laying the foundation to demonstrate—

The Court: I want to find out: Do you make them out?

Q. Was it a part of your duty to make out R and Rs?

A. Yes, sir.

The Court: That is what I asked you.

The Witness: Yes, sir. Pardon me.

Q. What was the rule and custom and the manner in which R and Rs were made out, what part was filled out?

The Court: Does the government object to that?

Mr. Aug: Yes, we object, your Honor.

The Court: I will sustain the objection. What was done in this R and R, whatever the exhibit number is.

Mr. Kelley: I am coming to that. I desire to lay a foundation for my questions. That is my purpose, a foundation, preliminary evidence. I will make it relevant. I can explain why, if your Honor wishes.

The Court: What their practice and custom was.

Mr. Kelley: Yes, your Honor. It will be very relevant. It is most relevant, your Honor. The government has introduced in evidence what has been marked as Government's Exhibit 28-A. It was read to the jury and it was pointed out in the reading that over at the right-hand corner of 28-A appear the initials, capital letters, RGH/bgs. Those are the initials of the defendant Hollifield. However, on this exhibit defendant Hollifield's signature appears nowhere.

Now having reference to Government's Exhibit 26 it has just been testified to that the initials NKH, those of this witness, appear there. However, this witness's signature does not appear here. I desire to demonstrate and lay this foundation just as was testified by Lieutenant Moss, that it was the rule and custom that the man who initiated or prepared the R and R would write it out in longhand, submit it to the secretary, that she assumed he had written it and would put down the initials upon that assumption. That it was the rule that once typed up it would then go to the man who supposedly had initiated it, that is to say, the man whose initials were there. It was the rule that he first would place his signature under "Concurrence". In other words, if a man had dictated, wrote it out in longhand, the stenographer wrote it out;

she put the initials of the man whose writing she believed that to be and it was then carried to that man's desk; he to put his name down first under "Concurrence".

I will demonstrate as to Exhibit 26, which bears this man's initials, thus indicating that he was the initiator, he had nothing to do with it; that this was an error, common error out there, because of an overworked stenographer. She could only assume whose writing it was and put down the initials. Exactly the same error appears in Government's Exhibit 28-A where they have Hollifield's initials and not his signature.

The Court: Purely argumentative, Gentlemen. Does it give the initials of the stenographer?

The Witness: Yes, it does.

The Court: Whose initials are those?

The Witness: The stenographer's initials, sir?

The Court: Yes.

The Witness: Barbara Sensenbaugh.

The Court: What exhibit are you looking at?

The Witness: At Exhibits 26 and 28-A.

The Court: Both by Barbara Sensenbaugh?

The Witness: Yes.

The Court: All right. I will sustain the objection. You can call in Barbara Sensenbaugh and let us find out what the fact is, not what the custom was. Let Barbara come in and tell us what she did. Is she still out there?

Mr. Kelley: Yes, sir, she is.

The Court: I am asking the witness. Is she still out there?

The Witness: Yes, she is.

A. I am secretary-stenographer at Wright-Patterson.

Q. How long have you been so employed?

A. A little over three years.

Q. And that has been continuous?

A. Yes.

Q. In January of 1951 you were then employed as a secretary-stenographer?

A. Stenographer.

Q. In what portion or unit or division of Wright Field were you so employed?

A. At the Aero Medical Laboratory. At that time it was the engineering division.

Q. Were you the only typist-secretary in that division?

A. It was the Medical Specialties Branch in the Aero Medical Laboratory. At the time I was one of two girls.

Q. In the branch, the Medical Specialties Branch?

A. Yes.

Q. That branch is composed of some units, is it not?

A. Three units.

Q. One of those units is Land Survival Unit, of which Mr. Hollifield, one of the defendants in this case, was the unit head?

A. That is right.

Q. There was also employed in the Land—in the Medical Specialties Branch, in January of 1951, a Mr. Hanselman, was there not?

A. Yes, sir.

Q. Do you know his full name?

A. Norman K.

Q. Norman K. His initials would be NKH?

A. Yes.

Q. And Mr. Hollifield's full name?

A. Robert G. Hollifield.

Q. His initials would be RGH?

A. Yes.

Q. Did you do all the typing, official business typing of materials, either dictated or written out in longhand by the men in the units of the branch where you worked?

A. All except the sea survival unit.

Q. As of the time under consideration, January, 1951, you did do all the typing, did you, as to the men in the land survival unit?

A. Yes, sir.

Q. Do you remember what men composed that unit then?

A. Yes, sir.

Q. In addition to Mr. Hanselman and Mr. Hollifield?

A. Mr. Parker, Mr. Murray, Mr. Bright and Mr. Holton.

Q. So you did all the typing for those men in the Medical Specialties Branch?

A. Yes, sir.

Q. Do you have a heavy work load?

A. Very much.

Q. Your work pile up on you from time to time?

A. Quite.

Q. I show you, Miss Sensenbaugh, first, an instrument which has been marked in evidence as Government's Exhibit 26 and I will ask whether or not you typed that document?

A. Yes, sir.

Q. I show you what has been marked in evidence as Government's Exhibit 28-A and ask whether you typed that instrument?

A. Yes, sir.

Q. Now, having reference to Government Exhibit 26, do your initials appear thereon?

A. Yes.

Q. About in the center, over to the right and side of the page, in small letters, "bgs"?

A. Yes.

Q. And a slant in front of that and in front of the "bgs" is what?

A. NKH.

Q. Those are the initials of whom?

A. Norman Hanselman.

Q. Did any other man for whom you did typing possess the initials NKH?

A. No.

Q. Have you come to learn when you placed the initials "NKH" on that R and R, Government's Exhibit 26, that you committed an error?

A. Yes, sir.

Q. What was the nature of the error that you made?

A. The R and R was not written by Mr. Hanselman.

Q. What led you to put his initials on it?

A. I don't know. It could have been a mix-up in the handwriting.

Q. Did the men in the Land Survival Unit furnish you with work to be typed in longhand, in their own handwriting?

A. Yes, sir.

Q. Were there occasions when you were confused in determining the author of that handwriting?

A. Yes, sir.

Q. Now while you have Mr. Hanselman's initials there, does Mr. Hanselman's signature appear thereon?

A. No.

Q. What was the custom as respects the connection between the initials of the man who initiated and dictated it and where, if any place, he would sign it?

Mr. Aug: We object to the custom.

The Court: I will sustain the objection. Not what the custom is. She has a specific document in her hand, Plaintiff's Exhibit No. 26. Now she may testify as to that specific document, but I will sustain the objection as to what the custom was.

Mr. Kelley: I would like to make an offer of proof, please, for the record.

The Court: Yes, you may, of course.

(Out of the hearing of the jury.)

Mr. Kelley: Let the record show the following offer of proof: Were the witness Barbara Sensenbaugh permitted

to answer the question, to which objection was made and sustained, she would testify that it was the regulation and custom in the Medical Specialties Branch, at Wright Field, that the originator or dictator of a Routing and Record Sheet, whose initials by custom, rule and regulation appear on such R and Rs next to the initials of the typist, would by such regulation, rule and custom sign his name in the first position immediately beneath the printed word "Concurrence". All R and Rs require the typing in of the name of the chief of the Medical Specialties Branch and beneath that the typing of the word "Concurrence" beneath which all employees actually concurring in the R and R were required by custom, rule and regulation to sign their names, with the added custom, rule and regulation that the initiator, that is to say, the one who dictated or wrote out in longhand for typing the R and R, would sign his name first and immediately below the word "Concurrence".

(In the hearing of the jury.)

Q. In preparing, that is to say, in typing R and Rs, did you follow established procedure, that is to say, procedure established in that branch where you worked?

A. Yes.

Mr. Kelley: I am not undertaking to violate wilfully the Court's ruling. I want to reach this question.

The Court: Ask the question.

Q. Was it a part of that established procedure, which you were required to follow, to type in the initials of the person who you believed to have initiated the R and R?

A. Yes.

Q. Was it likewise the established custom after yor had typed it, including the initials—

Mr. Aug: That is the same question.

Mr. Kelley: Let me get it into the record.

The Court: I will sustain the objection. Let us get the lady in who did it, not go according to custom. That is not the way to do it. I will sustain the objection but counsel may call this lady in and if she says as a matter of of fact, not what the custom was, but what she did in each of these cases, I think that is perfectly competent.

Mr. Kelley: I wish to go further in identifying this instrument.

Q. Referring to Exhibit 26, where your initials appear, did you initiate or have anything to do with that R at 1 R?

A. No, sir.

Q. And yet your initials are there?

A. Yes, sir.

Q. Do you of your own knowledge know of other instances in which the initials of a man were put down on an R and R, when he didn't initiate it or have anything to do with it?

Mr. Aug: Objection.

The Court: I will sustain the objection.

Mr. Kelley: I said to his own knowledge.

The Court: I will sustain the objection. I don't care if there were a thousand things done like that out there. Barbara Sensen is alive; she is out at Wright Field; she knows exactly what she did, or should know, with regard to these particular exhibits. It don't make any difference how many errors were made. Let's find out from Barbara Sensenbaugh what was done in these particular cases.

Mr. Kelley: If the Court please, if Barbara was here, she doesn't know whether she made a mistake

The Court: I will sustain the objection.

Mr. Kelley: My question, if the Court please, I don't know if your Honor—I said to his knowledge were mistakes of this kind made by this girl.

The Court: I understand that. It don't make any difference. Suppose he says to his knowledge there were a thousand mistakes out there. That doesn't make this a mistake. That is argumentative.

Mr. Kelley: It is a question for the jury.

The Court: You get Barbara in here one side or the other. The jury can very quickly tell whether Barbara made a mistake or not. You can't do it this way. This is purely a matter of argument.

Q. Having reference to Government's Exhibit 26 where your initials appear, Barbara made a mistake there, didn't she?

Mr. Aug: Objection.

The Court: I sustain the objection.

Mr. Kelley: If the Court please—

The Court: I will sustain the objection to all this line of questions and counsel may dictate in the record what they expect to prove. I will repeat now that we know who it was that did this, who the typist was, who actually made this out, she is the one to call to tell us the facts.

Mr. Kelley: Your Honor, it is this man's initials that are on here, NKH. It has already been testified he is the only man with the initials NKH. I wish to prove Barbara made a mistake on this document.

The Court: I will sustain the objection. I don't think it proves anything. You can call Barbara Sensenbaugh. You can't prove it this way. It is purely argumentative all the way through. It doesn't prove anything.

Mr. Kelley: I don't wish to try your patience.

The Court: I sustain the objection.

Mr. Kelley: Would you hear me briefly? My point is this—

The Court: I understand the point, Mr. Kelley. Please let us get along with our lawsuit. No use to ask those matters over. I sustained the objection. I give counsel the opportunity to call in the young lady, who he said wrote this, who is still out there, still alive. She isn't in Germany or dead or anything else. Call her in and find out if she made a mistake.

Mr. Kelley: It has been our intention. I intend to call her. I have interviewed her. I intend to. I can't have but one witness on at a time.

The Court: I understand. You may do that. I sustain the objection to these questions because they do not prove anything. It is argumentative.

Mr. Kelley: Note an exception on the materiality and relevancy of the Court's ruling.

The Court: Certainly.

Q. Mr. Hanselman, as an employee of the government, did you work at one time at Hill Field Air Force Depot in Ogden, Utah?

A. I never was employed at Hill Field.

Q. Did you do anything out there at Hill Field as a government employee?

A. Yes, sir.

Q. Did you have anything to do with the packaging of goggles there?

A. Yes, sir.

Q. Were they government owned and government packed goggles?

Mr. Aug: Do we know when he worked or was out at Ogden, Utah? Have we anything relevant here to our case? Have we determined when Mr. Hanselman was present at Ogden, Utah?

Mr. Kelley: In undertaking to lay the foundation of any proof, I can indicate its relevancy. At the conference

as to which there has been testimony in the Med. Lab., allegedly attended by Mr. Hollifield, Mr. Murray, Mr. Strand, Mr. Moss, Mr. Opper and an unknown man, there has been testimony here that Mr. Hollifield, among other things, represented at that meeting that some 15000—this so appears also in Government's Exhibit 28-A—

Mr. Aug: My question is, have we anything relevant to our case?

Mr. Kelley: "Items in exact accordance with the sample goggle submitted by this office have been furnished as GFE on 15,000 D-1 kits which the government has packaged." I desire to demonstrate that this man himself supervised that packaging and have him identify the government furnished goggles that he packages as being the same as the sun glasses which were in the conference at that date. That is my purpose and relevancy.

The Court: You may show him that exhibit and ask him that question. If the government objects, I will sustain it.

Q. I show you what has been marked for identification Defendants' Exhibit W and ask you whether or not you have as an employee of the government supervised packaging of such goggles?

Mr. Aug: Objection, your Honor.

The Court: I will sustain it. If you wish to ask him whether or not that is the goggle that was brought up by Mr. Hollifield that day—These are the goggles?

Mr. Kelley: Your Honor, it has already been demonstrated that we don't know where they are. Mr. Moss doesn't even know whether they are. I want to show by Moss these are identical.

The Court: You will have to look at them to do that.

Mr. Kelley: Mr. Moss was looking at that one. I would like to make an effort to prove—

The Court: The officer had his cap laying there. Now, it was a blue cap. You might bring in two caps that would look so much alike that he would have to say, "Yes, these look exactly alike, like the ones we have." But if when you analyze them and test them you find one is made out of cotton and the other out of wool, they are not the same thing at all.

Mr. Kelley: If your Honor will just hear me. When Lieutenant Moss was on the stand, he was the man, the optometrist in the lab. at that conference, who was looking at the glasses he had then. That very man I had here told me he didn't know where those samples were. I handed him these and asked him if these were not identical to the ones he had out there. If a thing is gone and disappeared, we can only establish its facsimile by a man who has seen both. This is not a cotton hat, a wool hat. "I know what I saw at that conference and this is it." That is what I want to show.

The Court: He can testify that this is the goggle he saw out there. That is a question of fact.

Mr. Kelley: This is the project of Lieutenant Moss. This witness will say that this goggle is the same as the government packaged.

Mr. Aug: The question is whether those goggles meet specifications.

The Court: I will sustain the objection.

Mr. Kelley: May I make an offer of proof in the record?

The Court: Oh, certainly.

(Out of the hearing of the jury.)

Mr. Kelley: Reference is here made to the offer of proof earlier made in connection with a question put to Lieutenant Moss as respects defense Exhibit W, objection to the same being sustained and an offer of proof then having been made.

The instant offer of proof is as follows: Were the witness Hanselman permitted to answer the question as to which an objection has been sustained he would testify that in 1948 under his direct supervision, more than ten thousand sun goggles, identical to Defendants' Exhibit W, were government owned and government furnished goggles and were packed by government employees and used by the armed forces during military operations, and that no complaint of unsuitability was ever received with respect to any of said goggles so used.

Had the Court permitted Lieutenant Moss to answer the question put to him, as to whether or not Defendants' Exhibit W did not represent sun goggles identical to those that he had in his possession and inspected during the conference shortly prior to January 25th, which sun goggles were the very subject matter of discussion at said conference, Lieutenant Moss would have answered that they were identical. Thus the witness now on the stand, Hanselman, would have connected up this evidence by likewise identifying Defendants' Exhibit W as being identical with the more than ten thousand goggles packaged as hereinbefore noted. Through these connections it would then appear in evidence that more than ten thousand goggles, government owned and government furnished and government packaged were shipped into the field and used without compiaint, and that such goggles so used were identical to the goggle under consideration in the Vision Lab. during the conference above noted. And this testimony would establish that the representation allegedly made by Hollifield at said conference and the representation which appears in Government's Exhibit 28-A, to-wit, "3. Items in exact accordance with the sample goggle submitted by this office have been furnished as GFE on 15,000 D-1 kits which the government has packaged." It thus would be demonstrated as a matter of evidence that the representation allegedly made by Hollifield orally at the conference and the representation made in writing in Government's Exhibit 28-A were truthful and accurate representations.

(In the hearing of the jury.)

We vacate the witness for cross-examination but I would like to request while he is on the stand he hold himself available until such time as we call this stenographer. It may be necessary in view of that to establish something about these documents. You may cross-examine.

Mr. Aug: Your Honor, I would like to ask the witness one or two questions.

Cross-Examination, by Mr. Aug.

Q. You have testified, Mr. Hanselman, that the conference at which the goggles were approved took place in October or in the fall. You also testified that the conference took place before the bids by Cappel-MacDonald and Buchsbaum.

A. I had the attorney repeat the question and he stated the fall and I said yes.

Q. All I am trying to do is see whether we can fix that date. Was it before the time of the Cappel-MacDonald bid to your best recollection?

A. Yes, sir.

Mr. Aug: No further questions.

The Court: That is all, Mr. Hanselman.

Mr. Kelley: Your Honor, we have had considerable difficulty—Perhaps I had better say this at the Bench. Come up.

(Counsel on both sides confer at the Bench out of the hearing of the jury.)

The Court: Members of the Jury, counsel are endeavoring to have their witnesses here with a view to run along as rapidly as we can. Sometimes they don't cross-examine a witness as long as maybe they think they will, or something else happens. So, counsel just advised me if I would adjourn until tomorrow morning at 11 o'clock,

since it is almost adjournment time, to give them an opportunity to have additional witnesses here, which I told them that I would do, and I would therefore recess the further hearing of this case now until tomorrow morning at 11 o'clock.

During this interval bear in mind my usual admonition. Return here, if you please, at 11 o'clock tomorrow morning.

Now the jury may be excused. Counsel may be excused if you wish, but I have some other matters here to take up with some other attorneys in some civil matters. It has nothing to do with your case at all. They will be over here, I suppose, at 4 o'clock. That is the time we fixed for them. I won't adjourn therefore—I won't adjourn court. What I am going to take up has nothing to do with this case at all. It has to do with the succeeding cases.

Thereupon the further proceedings in the trial of this cause were adjourned until tomorrow morning at 11 o'clock.

Morning Session.

Wednesday, May 28, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, except Mr. Richter, the trial of this cause proceeded as follows:

MISS BARBARA SENSENBAUGH, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Miss Sensenbaugh, would you please state where you reside?

A. In Dayton.

Q. Your full name is Barbara—

A. Barbara G. Sensenbaugh.

Q. What is your present occupation?

The Court: Ask your question.

Q. —to transmit for the purpose of permitting a signature of the initiator to be placed first and immediately under the word "Concurrence". Was that an established custom?

Mr. Aug: We object.

A. Yes.

The Court: I will sustain the objection on the ground we have here now before the witness Plaintiff's Exhibit No. 26, which she herself has testified that she did the typing on. I would like to have the record show, if I may, that it is the Court's view that it is not proper or material as to what the custom was. We have here a specific document. If Miss Sensenbaugh testified about that document, I think it is perfectly proper. Now, it is the custom of this Court to meet at 11 o'clock. Somebody is called in here next week and they say, "Well, I was in Judge Nevin's court to testify at 11 o'clock." "How do you know that? Because it is his custom to meet at 11 o'clock." Well, we didn't meet this morning until twenty minutes till 12, because counsel asked me to give them a little time. So custom is not the thing we are talking about. It is the specific thing. In fact, we have the instrument here. So I hold that we can't rely upon what the custom is, where we have a specific document, which the lady herself knows all about, apparently. If she doesn't, of course, she can't testify about it. I will sustain the objection on those grounds.

Mr. Kelley: Will the Court hear me briefly on this point of relevancy? Overt Act 6, of count 5 of the indictment, recites that on or about the 25th of January, 1951, at Wright-Patterson Air Force Base, Ohio, Hollifield did cause a memorandum to be prepared and sent to the Visual Unit, Aero Medical Laboratory, Wright Air Development Center, Wright-Patterson Air Force Base, in which it was

requested that the Visual Unit reconsider its rejection of certain goggles which had been supplied by Opper.

In support of that overt act the government introduced into evidence Plaintiff's Exhibit 28-A representing it to be the memorandum which it is alleged in overt act 6 that Hollifield caused to be prepared and sent to the Visual Unit.

Now, as the government pointed out when it read this, it has the initials RGH of Mr. Hollifield on it but nowhere else, no signature of Hollifield.

It is my purpose to demonstrate here the custom to show that Hollifield did not cause this to be prepared because as the custom, as I have indicated, had he done so, custom would have required he sign it.

Also I wish to point out since his initials are here, they may be here by error, as others have been made on similar documents and on other occasions.

The Court: As I said yesterday, in my opinion, I don't think it makes any difference if there were a thousand errors made. The question is, was there an error made in Plaintiff's Exhibit No. 26? Was there an error made in that exhibit you are talking about there?

Mr. Kelley: That is what I want to establish, your Honor.

The Court: You tried to establish that by a custom. I sustain the objection and you may make a proffer of your proof in the record.

Mr. Kelley: I have made my proffer on the record.

Q. Now, Miss Sensenbaugh, you have testified that as respects Government Exhibit 26, when you placed the initials of Mr. Hanselman thereon, you did that mistakenly, having mistaken the handwriting?

A. Yes, sir.

Q. Now, I show you Government's Exhibit 28-A and you did place on there the initials of Mr. Hollifield, did you not?

A. Yes.

Q. Going back to 26, is it the fact that you realized you had made an error only because Mr. Hanselman told you he didn't have anything to do with this?

A. Yes, sir, he told me immediately after I had typed it.

Q. The only way you have of knowing you made a mistake is because Mr. Hanselman said he didn't have anything to do with it?

A. Yes, sir.

Q. Now, in 26 you have Hanselman's initials but no Hanselman signature?

A. Yes.

Q. In 28 you have Hollifield's initials but no Hollifield signature; is that right?

A. Yes, sir.

Q. Ask you whether or not placing of RGH initials there might not have been done by error, just as you did here?

A. Yes, sir.

Mr. Kelley: That is all.

Cross-Examination, by Mr. Aug.

Q. Miss Sensenbaugh, on Government's Exhibit No. 28, which contains the initials RGH, do you know of your own knowledge whether you made a mistake on that instrument or not?

A. No, sir.

Q. Nobody called this instrument to your attention?

A. No, sir.

Q. Nobody told you you had made a mistake?

A. No, sir.

Mr. Aug: No further questions.

Redirect Examination, by Mr. Kelley.

Q. Didn't Mr. Hollifield tell you that he had no recollection of ever having prepared this Exhibit 28?

A. Yes, sir.

Recross-Examination, by Mr. Aug.

Q. When did he tell you that, Miss Sensenbaugh?
A. Today.

The Court: You mean since you came to the court house?

The Witness: Yes.

Re-Redirect Examination, by Mr. Kelley.

Q. This morning, was it not in this court room?
A. Yes, sir.
Q. After which you were interrogated by government counsel; is that right?
A. Yes.

Mr. Aug: No further questions.

Mr. Kelley:That is all.

And thereupon

EDWIN L. WAYMAN, JR., being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Your full name?
A. Edwin L. Wayman, Jr.
Q. Where do you live?
A. Grosse Point, Michigan.
Q. What is your present occupation?
A. I am serving as sales consultant for the Cappel-MacDonald Company.
Q. They have business premises here in Dayton?
A. Yes.
Q. Now, in the fall of 1950 were you an employee of that company?
A. Yes.
Q. Located here in Dayton?

A. In Dayton.

Q. And did it come to your attention in the fall of 1950 that the Cappel-MacDonald Company intended to bid on a contract for the production of E-1 kits?

A. Yes.

Q. Did you have something to do with the work involved in preparing that bid?

A. Yes.

Q. What was the nature of your work in that connection?

A. General expediter of materials, consisting in the pricing of the contract, general set-up of the contract itself.

Q. Before you expedited the material or components you had to locate it, didn't you?

A. Yes.

Q. Did you have anything to do with the location, finding of components?

A. Yes.

Q. Now, approximately, or to the best of your recollection, when and from whom did you first learn the name Opper?

A. About the first two weeks of October of that year, somewheres in that period.

Q. Of 1950?

A. Yes.

Q. And from whom did you first hear the name Opper?

A. I learned of it in our office.

Q. Do you recall who it was that told you?

A. No, I don't.

Q. And having heard the name Opper, what was the occasion in which it was mentioned to you?

A. The occasion was that he was able to supply us with certain items that were desired as part of the E-1 kit.

Q. What item was that?

A. Compasses originally.

Q. Did you have anything more than the name Opper itself?

A. As I recall, he was a W. Opper, who maintained a residence and office in Chicago; no address; no telephone number.

Q. What did you do then, if anything?

A. We placed a call through the information office in Chicago to learn where Mr. Opper might be reached.

Q. What did you find out?

A. They gave us a number and after some considerable time, we located Mr. Opper.

Q. What did you say when you started the conversation?

A. We asked if he were able to supply us a compass of a certain specification and type. He said yes, he was in the compass business, he had available tools and dies that would enable him to manufacture compasses of the kind desired.

Q. Did he indicate the source from which he obtained those dies?

A. Yes, the Waltham Company who had manufactured the compasses during World War 2.

Q. Was anything said in the conversation about samples?

A. We ask for samples as a routine necessity for appraisal of the item itself.

Q. What did you say, if anything, about when you wanted those samples?

A. Immediately.

Q. The deadline for filing your bid on the E-1 kit was when?

A. October 13th, I believe.

Q. 1950?

A. Yes.

Q. Now following that telephone conversation with Mr. Opper, did you receive from him some samples of compasses?

A. Yes.

Q. I show you what has been marked in evidence Plaintiff's Exhibit 29 and ask whether you can identify that, Mr. Wayman.

A. Yes, I recall that letter.

Q. What is that?

A. It is a quotation on several different items.

Q. From whom to whom?

A. Mr. Opper to our company.

Q. Dated when?

A. October 10, 1950.

Q. Would you fix the time of your 'phone call to him as on this date or the day prior?

A. I couldn't fix it because I don't recall exactly what date it was.

Q. Do you recall whether after asking him to send samples immediately he did so?

A. They arrived very shortly thereafter.

Q. After your 'phone call?

A. Yes.

Q. Having obtained those from Mr. Opper, these samples, did you examine them and discuss these compass samples with anyone?

A. Yes.

Mr. Aug: Your Honor, we have been talking about compasses. My impression of this case is we are talking about goggles. This witness has been interrogated for the past five minutes on compasses. We will object to interrogation on compasses.

The Court: I will overrule the objection. It may lead into something.

A. Yes, we discussed them immediately among ourselves.

Q. By "we," whom do you mean?

A. Mr. Cappel and those in the organization concerned with the bid.

Q. When you say Mr. Cappel, you mean Mr. Adam Cappel?

A. Yes.

Q. As of the time you placed the call with Mr. Opper you had no personal acquaintance?

A. No.

Q. Had you ever seen him in the Cappel-MacDonald Company office at any time?

A. Not to my knowledge, no.

Q. In this letter the government introduced in evidence, it is addressed "Dear Mr. Cappel" and at the bottom of the last page it says "P. S. A horseshoe for Mr. Wayman's secretary." Do you recall among the samples a compass set in a little horseshoe?

A. Yes. As I recall, it was a stock item manufactured by them.

Q. Did you have a secretary at that time?

A. We had one young lady working with us who did all the correlating.

Q. Was anyone known as Mr. Wayman's secretary in the office?

A. No.

Q. You had never seen him as of the date of this letter anywhere near the premises?

A. No.

Q. Did it come to your attention that an airplane was sent to Chicago to pick up any samples?

A. Yes.

What did you know about that?

A. That we had a source of the compasses, that we needed them in Dayton in very much of a hurry; we needed them in a hurry; we had to get them down here as quickly as possible.

Q. You didn't go with the plane?

A. No.

Mr. Kelley: I think that is all. You may cross-examine.

Mr. Aug: Your Honor, we move to strike the testimony of this witness with respect to everything that has been said as to compasses. There is nothing in this case about compasses and the witness hasn't testified to anything but compasses.

The Court: I will overrule it. It may stay in. It is in connection with this letter, I presume. It is all right.

Mr. Kelley: The government introduced the letter. It has compasses all through it.

The Court: It is all right. I overruled the objection.

Mr. Aug: No questions, your Honor.

The Court: That is all.

Mr. Kelley: Do you know the name of the pilot of Mr. MacDonald's plane?

The Witness: Yes. John A. De Wolf.

And thereupon

ADAM DENISON CAPPEL, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Would you please state your full name?

A. Adam Denison Cappel.

Q. I address your attention to the year 1950 in the fall of the year, at that time, what was your occupation?

A. I was general manager of our government contracts division, at that time, at Cappel-MacDonald and Company.

Q. Here in Dayton, Ohio?

A. That's right.

Q. Now, as of that time, state whether or not the Cappel-MacDonald Company filed a bid for a contract to produce E-1 kits for the Air Force?

A. Yes, they did.

Q. Do you recall the date upon which that bid was required to be and was filed?

A. I think it was October 13th?

Q. Of 1950?

A. That's right.

Q. And prior to the filing of the bid, what, if anything, did you have to do with its preparation?

A. Well, it was a kit that comprised over a hundred different component parts and Mr. Wayman and myself

were lining up the different sources of supply, getting bids for the components, so that we could in turn bid to the government.

Q. Now, when and from whom, if at all, did you first hear the name Opper?

A. I think it was very shortly before we put in our bid because we hadn't heard of his being a source of supply for items that made up the kit and it was possibly the 10th or the 9th of October, just a few days before we put in our bid.

Q. From whom did you first learn the name Opper?

A. His name was given to me by Mr. Hollifield as a William Opper or W. Opper, in Chicago.

Q. Was it William or W?

A. I think it was just W.

Q. In that conversation, did you ask Mr. Hollifield for any further information?

A. I asked him for his address and he said he didn't know it; he had just heard of the man and so we took the telephone book, or I gave the name to Mr. Wayman, who, I think, through Chicago information was able to locate him.

Q. Now, up to this time your knowledge of Mr. Opper, limited as you have just explained, was in relation to compasses only?

A. That is right.

Q. And you were in search of a compass as one of the component parts needed in the E-1 kit?

A. That is right.

Q. Was it reported to you by Mr. Wayman that he had been in telephonic communication with Mr. Opper?

A. Yes. He said he had got in touch with him, yes.

Q. I show you now, Mr. Cappel, what has been marked in evidence as Government's Exhibit 29. Did you ever see that before?

A. Yes, sir.

Q. What is that?

A. That is a quotation for different items in the kit.

Q. It is from whom and to whom?

A. It is to me from Mr. Opper.

Q. Dated 10 November 1950?

A. That is right.

Q. Now, when you received that letter were you at all acquainted with Mr. Opper?

A. No.

Q. To your knowledge, had he ever been in your place of business?

A. I don't believe so.

Q. Now, immediately above the signature "W. J. Opper" it says, "Best of luck and hope you get the award. P. S. A horseshoe for Mr. Wayman's secretary." Did anyone in your organization have any acquaintanceship with Mr. Opper?

A. I don't believe so, other than a telephone conversation.

Q. That Mr. Wayman had?

A. Yes.

Q. On the late afternoon of the 11th of October, 1950, did you receive a 'phone call from Mr. Opper?

A. I believe so.

Q. You were in Dayton?

A. That is right.

Q. Was there anyone else in your office that was a party to that 'phone conversation with Mr. Opper?

A. Well, as I recall it, he said he had full samples.

Q. By "he" you mean whom?

A. Mr. Opper.

Q. Tell us the conversation.

A. I think he mentioned he had full samples that might be acceptable as component parts for this kit.

Q. What component part specifically?

A. Well, he mentioned signal lights and mirrors and goggles and several other things—head nets, I believe. So, we didn't know whether they would be satisfactory or not. So, I think that is the time we agreed to send the plane up to Chicago, our company plane, and I think I

got Mr. MacDonald on the 'phone at the same time to see if the plane would be available to go to Chicago the following morning. It must have been late in the afternoon or we could have gone up that day.

Q. Do you happen to recall positively the date that the plane did go?

A. Well, no. I don't remember the date but the log of the plane would show that.

Q. If the proof will demonstrate that the plane went down on the morning of the 12th, would you then state that the 'phone call from Mr. Opper was in the afternoon of the 11th?

A. The day before, yes.

Q. Did it come to your attention on the 12th a package came to you through the means of that plane?

A. Yes. The plane returned, as I recall, around noon, and we sent the samples and we sent the samples of the things we thought might have value in the kit, we sent the samples to the Field for examination.

Q. That would be on the 12th of October, 1950?

A. That would be right.

Q. And the deadline for your bid was the next day at five p. m., the 13th?

A. That is right.

Q. You were in a hurry?

A. That is right. That is the reason I couldn't take the samples out.

Q. Do you remember whom you sent out there to the Field with samples for examination at the Field?

A. As I recall it, Mr. Klein, in our department took them out.

Q. After having sent Mr. Kline out to the field on the afternoon of the 12th of October, 1950, state whether or not Mr. Cline telephoned you from the Field as to the results of his visit with those samples?

A. Yes, he 'phoned and he told me that the goggles and the mirror had been rejected.

Q. Did he say why the goggles were not found acceptable that afternoon?

A. I don't recall whether he told me then or not, but I think he said because they didn't have spare lens.

Q. Spare extra lens?

A. Extra lens.

Q. He told you the compasses seemed to be all right?

A. Yes.

Q. Mr. Cappel, I show you what the government has introduced in evidence as Exhibit No. 31. Can you identify that letter?

A. It is my signature.

Q. And it is from what company?

A. From our company.

Q. You signed it in what capacity?

A. Vice-President.

Q. Of Cappel MacDonald Company?

A. That is right.

Q. And you forwarded this letter, or caused it to be forwarded to the Wright Patterson Air Force Base?

A. That is right.

Q. Tell the court and jury whether William J. Opper had anything whatsoever to do with the preparation or forwarding of that letter to the Field?

A. I don't think he had anything to do with it.

Q. Do you know he did not?

A. I am sure he did not.

Q. Mr. Cappel, do you recall on the afternoon of the 13th of October, 1950, the day on which your E-1 kit bid was filed—do you recall receiving a 'phone call from Mr. Hollifield in relation to the ski goggles, samples of which you had sent out by Mr. Kline the afternoon before?

A. Yes. He called and approved the goggles.

Q. What did he say to you?

A. Well, they had found secret pockets in the case that contained the lenses that I didn't know about and I don't believe they knew about and, therefore, the reason they were rejected previously was because they didn't have the spare lens and they had located them.

Q. And what was his purpose in calling you?

A. He said they would be satisfactory to use in our bid because they were found satisfactory and it would have made a considerable difference in our bid price to the government.

Q. Just prior to receiving that call you had your bid in shape to take it out to the Field and file it, did you not?

A. Probably have to have it out pretty soon.

Q. Just after that call you directed certain changes to be made in your bid, did you not?

A. That is right.

Q. I show you, Mr. Cappel, exhibit introduced in evidence by the government under the Exhibit Number 30 and I direct your attention to a page within that exhibit, which page is the fifth page from the end. I direct your attention to the center of that page where in typewriting it appears under the heading, printed heading "Name and address sub-contractor or supplier," in typewriting there appears "Foster Grant Company, Leominster, Mass."

A. Correct. Right.

Q. Next column, "Goggles, Ski-Mountain."

A. Right.

Q. Quantity 14,200. Correct?

A. Right.

Q. Next column, "Unit price paid sub-contractor." Beneath that "$5."

A. Right.

Q. And extended total $71,000.

A. That is right.

Q. Is that correct?

A. Yes, sir.

Q. Now I ask whether there is a line drawn through that entire language that I just read?

A. Right.

Q. Now, had this page and that particular line been prepared without any line through it prior to that 'phone call from Mr. Hollifield on the afternoon of the 13th?

A. It probably had.

Q. Was the line put on there by your direction after and as a result of that call from Mr. Hollifield?

A. I would presume so, yes.

Q. You did direct that the change be made, didn't you?

A. That is right.

Q. Now I refer you to the second from the last page, another sheet headed "List of sub-contractors and suppliers," and refer you to the next to the last line. There is a different ribbon type on this line, is there not?

A. That is right.

Q. And the first column under "Name and address of supplier" appears "W. J. Opper, Chicago, Illinois"; is that correct?

A. That is right.

Q. Column under "Description of Item," "Goggle, Ski-Mountain"?

A. Right.

Q. "Quantity 14,200"?

A. Right.

Q. "Unit price $1.40"?

A. Right.

Q. Extended price—

Mr. Aug: May I ask this: Is Mr. Kelley the witness or is Mr. Cappel the witness?

Mr. Kelley: I think Mr. Cappel.

Mr. Aug: I would think we ought to give Mr. Cappel a chance to answer these questions.

The Court: He was looking at the document. Go ahead.

Mr. Kelley: It is a matter of form. I can stand in front of the jury and let them see it.

Mr. Aug: It is in evidence.

The Court: Go ahead. If there is any question about it being read right—I don't think there is.

Q. "Unit price $1.40: extended price $19,880."

A. That is right.

Q. So, as a result of the 'phone call you received from Mr. Hollifield you altered your bid in this connection, reducing the amount from—

A. Savings of about—

Q. —from $71,000 down to $19,880. Correct?

A. That is right.

Q. I direct your attention, Mr. Cappel, to an exhibit that the government introduced in evidence under the identifying number "Plaintiff's Exhibit 10," and I refer you to the page numbered 11, being a part of that exhibit. I direct your attention to subparagraph H appearing therein which reads as follows: "It is hereby understood and agreed that no war surplus material and/or parts will be used in the manufacture of any equipment called for herein, except as may be authorized in writing by the contracting officer." That was a part of your contract, was it not?

A. That is right.

Q. And when, on the afternoon of October 12th, you sent Mr. Kline out with some sample goggles, you sent him out to the Field people who were going to procure this material, did you not?

A. That is right.

Q. When you received the call on October 13th with reference to goggles, it was with reference to war surplus goggles, was it not?

A. That is right.

Q. In the clause I just read where it said "except as may be authorized in writing by the contracting officer," did you by your letter of November 10, 1950, Government's Exhibit 31, seek such authorization?

A. That is right.

Q. And on the 27th of December, 1950, you did receive a contract change notification, did you not?

A. We probably did.

Q. I show you what the government introduced in evidence, marked as Plaintiff's Exhibit 32, and ask you to inspect it and see whether or not it does contain authority as requested by you in your letter of November 10th to supply war surplus goggles.

A. It states that it is satisfactory to use surplus goggles.

Q. That is a document issued by the Air Force, is it?

A. That is right.

Q. Contracting Department, notifying you that is o. k.?

A. Right.

Q. And the date of that is what?

A. December 27, 1950.

Q. It is a fact, is it not, that before you got this approval you paid William J. Opper in full for the 14,000 goggles you bought from him?

A. Well, I presume so.

Q. Who would know that in your organization?

A. Mr. Clemens, our auditor.

Mr. Kelley: You may cross-examine.

Cross-Examination, by Mr. Aug.

Q. Mr. Cappel, around the 9th, 10th, 11th of October you had never met Mr. Opper?

A. No, sir.

Q. Did you meet him after that time?

A. Yes.

Q. Can you fix a date as to the first meeting you had with Mr. Opper?

A. I believe it was after we submitted our bid, which would be after October 13th.

Q. Was it a matter of days?

A. Days, yes, I would say.

Q. Would it have been in the month of October?

A. I think so.

Q. Where did your meeting take place?

A. He came to our office.

Q. Opper was in your office in the month of October, 1950; is that correct?

A. That is right.

Q. Did you see him frequently after that?

A. Yes.

Q. With relation to this contract?
A. That is right.
Q. On these goggles?
A. That is right.
Q. How frequently did you see Opper, would you say?
A. I think two or three times before the end of the year.
Q. Would that have been in Dayton, Ohio?
A. Yes.
Q. So Opper was in Dayton, Ohio, two or three times before the end of the year 1950?
A. That is just a guess. I am not sure.
Q. Just a guess, but you do know he was here?
A. Yes.
Q. Did you know at the time you were submitting your bid on the E-1 kit that Buchsbaum in Chicago was also bidding on the E-1 kit?
A. Yes, sir.
Q. You knew that at the time?
A. Yes.

Mr. Aug: No further questions.

Mr. Kelley: That is all. Thank you, Mr. Cappel.

The Witness: I thank you.

And thereupon

MR. JOHN A. DeWOLF, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Will you please state your full name?
A. John A. DeWolf.
Q. Where do you reside, sir?
A. Detroit, Michigan.
Q. What is your present occupation?
A. Pilot.
Q. By whom are you employed?
A. Cappel-MacDonald and Company.
Q. Airplane pilot you mean?

A. Yes.

Q. Was that your occupation during the fall of 1950?

A. Yes.

Q. Do you have your log with you?

A. Yes.

Q. As a pilot are you required to maintain that log?

A. Yes.

Q. And in maintaining it you put down what information?

A. The day and place you flew and the length of time of the flight.

Q. Examine your log and state whether or not you made a flight from Dayton, Ohio, to Chicago on the morning of the 12th day of October, 1950?

A. Yes, I did.

Q. What was the flight—where to?

A. Dayton to Chicago and then from Chicago back to Dayton, and then from Dayton to Detroit.

Q. What time did you arrive at Chicago?

A. You don't put the exact time of the flight; it is just the length of flight.

Q. What time were you back in Dayton?

A. I would be guessing, but I would say around noon or shortly after one o'clock; somewhere around there.

Q. At whose direction did you go to Chicago that day?

A. I believe Mr. MacDonald's direction.

Q. What directions were given in making that trip?

A. To go to Chicago and pick up a package and bring it back to Dayton.

Q. From whom were you to obtain a package?

A. From Mr. Opper.

Q. Did you do so?

A. Yes.

Q. And return that to Dayton?

A. To Cappel-MacDonald and Company.

Mr. Kelley: You may cross-examine.

Mr. Aug: No questions.

And thereupon

MR. DONALD H. KLINE, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Will you please state your full name, Mr. Kline?

A. Donald H. Kline.

Q. What is your present occupation?

A. With Cappel-MacDonald and Company.

Q. And during the fall of 1950 what was your occupation?

A. I was working as—experimental work for Cappel-MacDonald in the government work.

Q. Where do you reside now?

A. You mean where do I work?

Q. Where do you live?

A. Sherwood Drive, Dayton, Ohio.

Q. I direct your attention to the afternoon of October 12, 1950. Did you make a trip to Wright Field at the direction of your employer Adam Cappel?

A. To the best of my knowledge, it was the 12th or 13th.

Q. Did you make such a trip either on the 12th or 13th?

A. I did.

Q. What were your instructions from Mr. Cappel in going to the Field?

A. I remember no instructions from Mr. Cappel. I took some material to the Field.

Q. On your own volition or somebody else's suggestion?

A. Somebody must have told me.

Q. You don't specifically remember who?

A. No.

Q. What did you take with you to the Field?

A. Took goggles, a head net, pocket compass and a mirror.

Q. Those are ski goggles you are talking about. Right?

A. That is right.

Q. Where did you go with those samples at the Field?

A. Aero Medics Lab.

Q. Who did you see there?

A. Mr. Hollifield and I think Mr. Murray and Mr. Hanselman.

Q. Were there others there?

A. Could have been. I don't remember.

Q. You do remember that?

A. Yes.

Q. Now, as respects the compass that you brought and the head net and the mirror and the goggles, were all of those items required components of the E-1 kit?

A. Yes, they were.

Q. And your company was at that time in the process of preparing to bid on the contract for the E-1 kit, were they not?

A. That is right.

Q. Now tell the Court and the jury what took place at the meeting of Mr. Hollifield, Mr. Hanselman, Mr. Murray and yourself?

A. The only thing I did was to show Mr. Hollifield these items.

Q. Did they discuss the various items in your presence?

A. Well, he discussed the compass, that I remember, and also the mirror. The other two, I don't remember any discussion at all.

Q. Is it your suggestion there wasn't any discussion about the other two?

A. I wouldn't know. I don't remember.

Q. How long were you there in all?

A. Oh, maybe ten, fifteen minutes; something like that.

Q. You had gone out in Mr. Cappel's car?

A. That is right.

Q. Did you make any statements with reference to these items, describing them or making any representations about them?

A. No. The only statement I made was to show Mr. Hollifield the compass which he checked with one he had in his desk.

Q. And then you, after a few minutes, went back to Dayton?

A. That is right.

Q. Did you make a telephone call before you went back to Dayton?

A. I called Adam Cappel about the compass, over Mr. Hollifield's 'phone, as I remember.

Q. You told him that the compass was all right?

A. That is right.

Q. You told him something wasn't all right. What was that?

A. That was the mirror.

Q. What about the goggles?

A. There was no reference made that I remember.

Q. You are stating you didn't say anything to the—

Mr. Aug: Objection.

The Court: Don't argue with the witness.

Q. What do you mean, Witness, when you say you don't remember?

A. I don't remember any conversation about the goggles.

Q. With Adam Cappel?

The Court: You mean over the telephone?

Mr. Kelley: Yes.

A. That is right, over the telephone.

Mr. Kelley: That is all. Cross-examine.

Mr. Aug: No cross-examination.

The Court: That is all, Mr. Kline. Call the next witness.

And thereupon

MR. NORMAN K. HANSELMAN, having been previously sworn, testified further as follows:

Direct Examination, by Mr. Kelley.

Mr. Kelley: Mark this as Defendants' Exhibits X and Y.

Thereupon two photographs were marked for identification as Defendants' Exhibits Nos. X and Y.

Q. Mr. Hanselman, I show you what has been marked for identification as Defendants' Exhibit X, which I just obtained from you. Will you state where you obtained that?

A. Wright Air Development Center.

Mr. Aug: May I see that?

Mr. Kelley: Yes.

Q. Mr. Hanselman, I show you what has been marked for identification as Defendants' Exhibit X. Can you identify that?

A. That is a photograph.

The Court: Answer the question.

Q. Can you identify it?

A. Yes, sir.

Q. What is it?

A. It is the photograph of the E-1 survival kit.

Q. I show you what has been marked for identification as Defendants' Exhibit Y. Can you identify that?

A. Yes, sir.

Q. What is it?

A. It is a photograph of the D-1 survival kit.

Mr. Kelley: We offer these in evidence.

Mr. Aug: We will object, your Honor.

The Court: What is your objection?

Mr. Aug: No proper foundation has been laid to admit the photographs of these kits in evidence.

The Court: Let us find out. You can ask him about it, if you wish, before I pass on your objection.

By Mr. Aug:

Q. Calling your attention, Mr. Hanselman, to Government's Exhibit X, which you have identified as being a photographic copy of the E-1 kit,—is that correct?

A. Yes, sir.

Q. Where did you obtain this photograph?

A. Wright Air Development Center.

Q. Whom did you obtain it from?

A. From the Still Photograph Unit.

Mr. Kelley: It says on the back there.

Q. Now, are you familiar with the component parts of the E-1 kit?

A. Yes, I am.

Q. Do you identify these as being component parts of the E-1 kit?

A. Yes, I do.

Q. Are you familiar with the component parts of the D-1 kit?

A. Yes, sir.

Q. Do you identify these as being pictures of the component parts of the D-1 kit?

A. Yes, sir.

Q. Where did you obtain this Defendants' Exhibit Y for identification?

A. From the Land Survival Unit of the Parachute Branch Equipment Laboratory, Wright Air Development Center.

Q. Do you know when these pictures were taken?

A. I know when the E-1 was taken.

The Court: That is X.

Mr. Aug: That is X, your Honor.

A. (Continued) It was taken either October or September 1951.

Q. When was this picture of the D-1 kit taken?

A. I don't know when that was taken.

Q. Do you know if there is any change in the component parts between October 1950 in the E-1 kit and October 1951?

A. October 1950—

Q. And October of 1951.

A. Would you—could you state the question differently?

(Thereupon the next to the last Q. was read by the reporter.)

Mr. Kelley: If the Court please, I object to that question because there was no kit in existence in October 1950.

Q. Do you know, Mr. Hanselman, that contracts were issued for the E-1 kit in October of 1950? Do you know that?

A. October, in the fall of 1950?

Q. In the fall of 1950.

A. Yes, sir.

Q. Now, in the approximate time of the contract and the performance under that contract, do you know if there had been any changes in the component parts of the E-1 kits up to October 1951?

A. There were changes—under the contract, you said.

The Court: Listen to the question. Please read the question.

Q. Any changes in the articles that went into this kit between October, November, December 1950 and October of 1951.

A. There were changes in the specifications, yes, sir.

Q. Then this picture doesn't represent the articles that were in the E-1 kits in the early part of the year 1951; is that correct? You stated—

Mr. Kelley: Let him answer the question. Read the question to him.

(Thereupon the last Q. was read by the reporter.)

A. I can't answer that question, unless I know the month.

The Court: You produced the photograph. When was it taken?

The Witness: It was taken October or September of 1951.

The Court: Now what information do you want?

Q. The question was, the early part of 1951, if that picture represented the kits that were on contract at that time.

A. The delivery of the kits started sometime in 1951. The month, I don't remember, but it would depend upon that, how the question was stated, whether it was after the delivery of the first kit. That is representative of all the kits that were delivered.

Q. That is what we are trying to get.

A. That is correct.

Q. This is a picture that contains the component parts that were in the kits as they were delivered; is that what you are saying?

A. That is correct.

Q. These changes that you refer to, were there any changes made after the delivery of the kits started?

A. I don't know.

Q. Could there have been?

Mr. Kelley: I object to that.

The Court: You don't know anything about it?

The Witness: I don't, no.

The Court: If you don't know, don't guess.

Q. You don't know the date this was taken on the D-1 kit?

The Court: That is Exhibit Y.

Mr. Aug: This is Exhibit Y.

Q. You don't know the date this picture was taken?
A. No, sir.
Q. Do you know if, on the date of the delivery, that is the time they started to deliver the D-1 kits, were there any changes in the component parts of those kits?
A. I don't know, sir.
Q. You don't know when this picture was taken?

The Court: That is Exhibit Y.

Mr. Aug: This is Exhibit Y.

A. No, I don't know the date.

Mr. Aug: We will renew our objection, if the Court please.

Mr. Kelley: I would like one further question before submitting it.

By Mr. Kelley:

Q. Having reference to Defendants' Exhibit Y for identification, are you personally familiar with the components that were required and that went into the D-1 kit delivered to the government?
A. Yes, sir.
Q. And does this Exhibit Y for identification truly and accurately represent, to your knowledge, a picture of all the components that went into the D-1 kit as delivered to the government?
A. To the best of my knowledge, it does.
Q. And would your answer be the same to an identical question in reference to the Government's Exhibit X, as to the E-1 kit components?
A. I am positive of this E-1 kit.
Q. Positive of what, that that picture truly represents accurately—
A. All the components delivered on the—represents all of the E-1 kits delivered to date.

Q. The components of those kits?
A. Yes, sir.

By Mr. Aug:

Q. But you are not positive as to the D-1 kits?
A. I am not positive, but to the best of my knowledge those are the items. I haven't familiarized myself with the contract. I would have to compare the contract with the picture.

Mr. Kelley: We renew our offer as to both.

Mr. Aug: We will object to the D-1. The witness has said he isn't familiar.

The Court: Which one?

Mr. Aug: The D-1—on the D-1, the photograph.

The Court: What is the exhibit number, please?

Mr Aug: That is Exhibit Y. The witness has said that he can't—

The Court: You object to that?

Mr. Aug: Yes, your Honor.

The Court: I will sustain the objection. What about Exhibit No. X for identification?

Mr. Aug: We will object to that, your Honor.

The Court: Very well. I will sustain the objection to both of them, as not being properly identified.

By Mr. Kelley:

Q. Now, counsel a few moments ago asked you about changes in the E-1 contract. Have you had occasion to examine the contract file on the E-1 kit to determine the number of contract change notifications that were issued on that contract, change orders?
A. Which, orders or change—
Q. Put it first contract change notifications from the government to the contractor.

A. Yes. I have seen the contract change notifications.

Q. Didn't you examine them at my request to determine this point?

A. I didn't examine the contract change notifications, the contract itself. That wasn't in my possession.

Q. Did you examine the contract change notifications in the contract file?

A. No, sir.

Q. What did you examine, Mr. Hanselman?

A. I examined the correspondence that left our—the Land Survival Unit to the Procurement Division, relative to changes on the E-1 kit.

Q. That is, deviations?

A. Deviations, yes, sir.

Q. And the result of that search demonstrated that requests for deviations on the E-1 kit numbered how many?

Mr. Aug: Objection.

The Court: I will sustain it. Leading question. Ask him.

Q. How many did you observe?

Mr. Aug: No, your Honor. I am objecting to that.

The Court: What is your objection?

Mr. Aug: He is asking how many change notices were there under this contract. I don't see the relevancy.

The Court: Let him answer the question, if he knows.

A. Deviations?

Q. Yes.

A. There was a total of approximately 65.

Mr. Aug: Approximately 65. Do you know, sir?

The Witness: I don't know exactly.

Mr. Kelley: I will turn the witness over in a minute.

Q. What do you mean by a total of approximately 65?

A. There may have been other changes processed through our office that were not in the files.

Q. Did you find at least 65?

A. Yes, sir.

Mr. Kelly: Cross-examine.

Mr. Aug: No questions, your Honor.

Mr. Kelley: That is all. Thank you.

The Court: That is all for the present anyhow. Now, it is just the adjournment time. I think it is a good time to stop now, probably.

Members of the Jury, we are about to recess the further hearing of this case until 2 o'clock this afternoon. During this time bear in mind my usual admonition. Return here, if you please, at 2 o'clock. Adjourn court until 2 o'clock this afternoon.

Thereupon the further proceedings in the trial of this cause were adjourned until 2 o'clock of the afternoon of the same day.

Afternoon Session.

Wednesday, May 28, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

MR. ROBERT L. HOOVER, having previously been sworn, testified further as follows:

Direct Examination, by Mr. Kelley.

Q. Your full name?

A. Robert L. Hoover.

Q. You are the same gentleman who was previously sworn in this case—appeared as a witness for the government?

A. That is right.

Q. You realize you are still testifying under oath?

A. Yes, sir.

Q. Your connection with Cappel-MacDonald and Company is what?

A. Purchasing agent.

Q. And are you custodian of certain records of that company?

A. I am.

Q. I will ask you whether or not, to your knowledge, the contract between Cappel-MacDonald and the United States Government, calling for the production of E-1 kits, was by the government canceled?

A. It was.

Q. On what date was it canceled?

A. I believe the date that we received the termination notice was October 12th?

Mr. Aug: What year?

The Witness: Of 1951.

Q. As purchasing agent will you state whether or not Cappel-MacDonald and Company ever bought any ski goggles for use in the E-1 kit from anyone except Mr. Opper?

A. No, sir, they did not.

Q. Bought all from Mr. Opper?

A. Yes.

Q. At the time the contract was canceled did the Cappel-MacDonald Company have on hand inventory that it had acquired in order to fulfill the E-1 kit contract?

A. Partial, yes.

Q. And did the United States Government following cancellation take title to that inventory?

A. They did.

Q. After the government had taken title to the remaining inventory were you directed by the government to ship that inventory somewhere at the government's request?

A. We were.

Mr. Aug: We object. No relevancy to the issues. The witness is being asked whether they shipped any goggles after the cancellation of their contract. The line of questioning as to what happened to these goggles after the contract had been canceled, I consider that of no relevancy to this case.

The Court: You shipped them someplace?

The Witness: We did.

Q. Have you produced one of the documents from your files?

A. We have.

Q. Would you please hand it to me?

A. (Witness does as requested by counsel.)

Mr. Kelley: Mark this Z.

Thereupon a shipping document was marked for identification as Defendants' Exhibit Z.

Q. I show you what has been marked for identification as Defendants' Exhibit Z. Can you identify that?

A. I can.

Q. What is that?

A. It is a shipping document covering material shipped from our plant against the terminated contract 16916.

Q. Having reference to the fifth sheet of this exhibit, the last item thereon refers to what?

A. Item No. 60-1 goggles, ski-mountain.

Q. That is goggles that you had acquired from William J. Opper?

A. They are.

Q. The goggles that the government acquired title to after cancellation of your contract?

A. That is right.

Q. Having reference still to Defendants' Exhibit Z for identification, to whom were those goggles and other materials shipped?

Mr. Aug: Objection.

The Court: I don't see the point to it.

Mr. Kelley: The point is this, your Honor: In the first place, government counsel in their opening statement to this jury made the statement that these defendants are charged with fraud as against the government of the United States. I desire to show by this witness that after this contract was canceled Opper ski goggles, the government took title to them and entered into another contract with the Belfer Corporation and used the same goggles as government furnished materials and they are now being used in kits for the government.

The Court: I will sustain the objection.

Mr. Kelley: May I make an offer of proof as to that in the record?

(Out of the hearing of the jury.)

Mr. Kelley: The defendant would show by this witness were he permitted to answer the question to which objection was made and sustained, that as appears by Defendants' Exhibit Z for identification, on page 6, at the time the Cappel-MacDonald and Company's E-1 kit contract was canceled, said company had on hand 4377 pairs of ski goggles, all of which it had acquired from the defendant Opper; would further show by the witness that the government following cancellation took title to said 4377 pairs of goggles and the government thereafter entered into a contract for the manufacture of E-1 kits with the Belfer Corporation, Brooklyn, New York, and by the terms of such contract said Belfer Corporation was to assemble E-1 kits, using as government furnished equipment the 4377 pairs of goggles purchased by Cappel-MacDonald and Company from Opper, and that said Belfer Corporation is presently producing such kits using said goggles as component parts thereof and delivering such kits to the government under the terms of its contract.

(In the hearing of the jury.)

Mr. Kelley: The defendant will offer in evidence the exhibit marked for identification Z.

Mr. Aug: We object, your Honor.

The Court: I will sustain the objection.

Mr. Kelley: Cross-examine.

Mr. Aug: No cross-examination.

The Court: That is all.

And thereupon

JEROME KISTNER, having been previously sworn, testified further, as follows:

Direct Examination by Mr. Kelley.

Q. Will you please state your full name? A. Jerome Kistner.

Q. You were previously sworn as a witness in this case and appeared here and testified on behalf of the government?

A. Yes, sir.

Q. Do you realize that you are still under oath and now testifying under oath?

A. Yes, sir.

Q. At my request did you obtain from the Wright-Patterson Air Force Base, and do you have with you now certain official documents of the government?

A. Yes, sir.

Q. Would you produce what you have?

A. (Witness does as requested by counsel.)

Mr. Kelley: Mark these AA and BB.

Thereupon the following exhibits were marked for identification:

Contract No. AF 33 (600) 9627 as Defendants' Exhibit AA.

Purchase Request No. 177,205 as Defendants' Exhibit BB.

Q. Mr. Kistner, I show you what has been marked for identification as Defendants' Exhibit AA. Can you identify that?

A. It is the—

Q. Can you identify it?

A. Yes, sir.

Q. What is it?

A. It is contract No. AF 33 (600) 9627.

Q. Between the United States government on the one part—

A. Right.

Q. And who is the other contracting party?

A. Belfer Corporation.

Q. Located where?

A. New York.

Q. I will ask you whether or not that contract relates in any sense to the production of an item involving ski goggles?

A. That I am not able to answer.

Q. And I show you what has been marked for identification Defendants' Exhibit BB. Can you identify that?

A. I can.

Q. What is that?

A. It is a purchase request No. 177,205.

Mr. Kelley: You may cross-examine.

Mr. Aug: No questions.

Mr. Kelley: May it please the Court, the last two exhibits which were marked as defense exhibits for identification AA and BB constitute originals of contracts still in operation. The witness would like to substitute for the record photostatic copies thereof in each case and if I have them similarly marked, may they be received in sub-

stitution for what has now been marked Defendants' Exhibits AA and BB for identification?

The Court: Yes, certainly.

Mr. Aug: No objection, your Honor.

The Court: Mark the photostats AA and BB.

Thereupon said photostats were marked for identification AA and BB.

Q. Mr. Kistner, I place in your hand Defendants' Exhibits for identification AA and BB. In your left hand I place two exhibits marked identically. Will you state in each case one is the photostatic copy of the other?

A. One is a photostatic copy and the other is an ozalid copy.

Q. They are, however, exact copies in each case?

A. Yes, sir.

Mr. Kelly: I then return to you the originals and retain the copies.

Mr. Aug: When were the photostats made, Mr. Kistner?

The Witness: This morning.

Mr. Kelley: That is all.

Mr. Aug: That is all.

And thereupon

LIEUTENANT LAWRENCE E. KAPERST, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Would you state your full name, Lieutenant?

A. Lawrence E. Kaperst.

Q. And your rank?

A. Second Lieutenant.

Q. Air Force?

A. That's right.

Q. United States Army?

A. United States Air Force.

Q. What is your present position?

A. I am a buyer in the Land Survival Unit, Material Section, of Wright-Patterson Air Force Base, or Materiel Command.

Q. Are you officially the Air Force buyer in respect of a certain contract between the government and the Belfer Corporation, of Brooklyn, New York, being contract No. AF 33 (600) 9627?

A. Yes, sir.

Q. I show you, Lieutenant, and ask you to examine what has been marked for identification as Defendants' Exhibit Z, Defendants' Exhibit for identification AA and Defendants' Exhibit for identification BB. Would you examine them and state whether or not you can identify each of those exhibits?

A. Yes, sir.

Q. Taking up first Defendants' Exhibit Z for identification, what is that?

A. That is a shipping document, a government shipping document, form DD150, which is a shipment—

Mr. Aug: Don't refer to the contents. You identified the instrument.

Q. Will you state whether or not it refers in part, Defendants' Exhibit Z, to the shipment of ski goggles?

A. May I look through a little further?

Q. Look at the bottom of page 6, the last page.

A. Yes, sir, it does.

Q. How many pairs?

Mr. Aug: Objection.

Q. All right. Now will you refer to what has been marked for identification as Defendants' Exhibit AA and state what that is?

A. AA is the contract entered into by the government and Belfer Corporation, at Brooklyn.

Q. Are you the buyer in connection with that contract?

A. Yes, sir, I am the buyer.

Q. Will you refer to what has been marked for identification as Defendants' Exhibit BB?

A. This exhibit is a purchase request which shows the requirements of the Supply Division with regard to a particular item.

Q. Is it related to the Belfer contract?

A. Yes, sir. The Belfer contract is the contract for that purchase request.

Q. To your knowledge, did the government acquire title to 4377 pairs of ski goggles from the Cappel-MacDonald Company.

Mr. Aug: Objection.

The Court: Sustained.

Mr. Kelley: May I continue to make my questions for the purpose of establishing the offer of proof?

The Court: Certainly.

Q. Lieutenant, to your knowledge, did the government ship to the Belfer Corporation 4377 pairs of ski goggles which it had acquired from the Cappel-MacDonald Company?

Mr. Aug: Objection.

The Court: I will sustain it.

Q. Lieutenant, is the Belfer Corporation at this time supplying the government under contract with E-1 kits which are composed in part of ski goggles obtained by the government from Cappel-MacDonald and Company?

Mr. Aug: Objection, your Honor, and I think this line of questioning has gone far enough.

The Court: I will sustain the objection.

Mr. Kelley: The Court has said this is the only way to get this testimony in and I am about to proffer it.

The Court: He is going to proffer.

(Out of the hearing of the jury.)

Mr. Kelley: Were the witness permitted to answer the last three questions put to him, to each of which questions the government objected and it was sustained, the witness would testify that upon cancellation of Cappel-MacDonald Company's contract for the production of E-1 kits, the government acquired title to 4377 pairs of ski goggles, which ski goggles Cappel-MacDonald and Company had purchased from William J. Opper; said witness would testify further that as is reflected in Defendants' Exhibit Z for identification, said 4377 pairs of ski goggles were shipped by Cappel-MacDonald to the Belfer Corporation for use as components in the packaging of E-1 kits by said Belfer Corporation under its contract, the same being Defendants' Exhibit for identification AA, said witness would testify further that the Belfer Corporation is now using said goggles in the production of E-1 kits and that said goggles are government furnished equipment described as "goggles, ski-mountain, Type 1."

(In the hearing of the jury.)

Mr. Kelly: You may cross-examine.

Mr. Aug: No questions.

Mr. Kelley: You may step down.

The Court: That is all.

Mr. Kelley: May we have about two minutes for a conference here?

The Court: Certainly.

Mr. Kelley: (After conferring with co-counsel) Call the United States Marshal. I am advised it is the Deputy United States Marshal,

And thereupon

CHARLIE MOBLEY, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Will you state your full name?
A. Charlie Mobley.
Q. What is your official position?
A. Deputy United States Marshal.
Q. For this district?
A. Southern District of Ohio.
Q. In your official capacity has there come to your notice a subpoena requiring the attendance in this case as a witness of Captain Norris Murray?
A. There was.
Q. Did you undertake to serve that subpoena?
A. I did.
Q. Tell us with what result?
A. I went to the Field on the 8th day of May and I learned that the Captain was on duty in Germany. I got this information from Colonel Lawless.
Q. At the Field?
A. Yes, sir.

Mr. Kelley: Cross-examine.

Mr. Aug: No cross-examination.

Mr. Kelley: That is all.

And thereupon

CAPTAIN JERRY MITCHELL, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Captain, would you please state your full name?
A. Jerry Mitchell.

Q. What is your official rank?

A. Captain, United States Air Force.

Q. And you are attached now where?

A. 2750 Air Base Wing, Wright-Patterson Air Force Base.

Q. Now, I direct your attention, Captain, to the month of November of 1950. What was your official position then at Wright Field?

A. Unit Chief of the Fabrics and Clothing Unit.

Q. Did you serve as official buyer for the United States in connection with any contract at that time?

A. I did.

Q. Buyer in connection with any contract with Cappel-MacDonald and Company?

A. I did.

Q. Was that the contract which called for the production of E-1 kits?

A. It is.

Q. One of the components of that kit was a ski goggle?

A. It was.

Q. Now, in the month of January of 1951 what was your official position at Wright Field?

A. Same as it was in November, 1950.

Q. Did you have any official connection or anything official to do with a contract between the government and S. Buchsbaum and Company, calling for the production of D-1 kits?

A. I did buy the D-1 kits. I don't remember which. I think it was.

Q. I show you, Captain, what was introduced in evidence by the government under the identification number Plaintiff's 22. Can you identify that?

A. It is a letter to me from the S. Buchsbaum and Company.

Q. And I show you what has been received in evidence, marked Plaintiff's 23. Can you identify that?

A. It is another letter addressed to me from the S. Buchsbaum and Company.

The Court: Pardon me. Will you please answer the question yes or no first. Can you identify it?

The Witness: Yes, I can.

The Court: Now, tell us what it is.

Q. Now, having reference to 22, what is that?

A. That is a letter addressed to me from S. Buchsbaum and Company.

Q. And it is dated when?

A. January 8, 1951.

Q. And relates to what contract?

A. Contract 18136 for the D-1 kits.

Q. Now, referring to Exhibit 23 in evidence, what is that?

A. It is a letter dated January 8, 1951, from S. Buchsbaum and Company to me on contract 17438 for the D-1 kits.

Q. Examination of those two exhibits, Government's 22 and 23, reveal that they are identical, except for the mention of one contract in one letter and a different contract in the other; is that correct?

A. That is correct.

Q. Now, I show you what has been received in evidence marked Plaintiff's Exhibit 25. Can you identify that?

A. Yes, I can.

Q. What is that?

A. It is an R and R, dated 11 January, 1951, from me to the Aero Medical Lab., attention Mr. Hollifield, Comment 1.

Q. The only R and R that you prepared is confined to Comment 1?

A. That is correct.

Q. There is another Comment 2 on there?

A. There is a Comment 2 on there.

Q. Now, retaining those documents, when you received those two letters from Mr. Buchsbaum, I will ask whether or not you received at the same time, among other things, some sample ski glasses?

A. The letter from Buchsbaum says they are attached.

The Court: Pardon me, Captain. You can answer that yes or no. Read the question.

(Thereupon the last Q. was read by the reporter.)

A. I don't recall.

Q. Did you give any mention in the R and R you prepared any samples?

A. No, the R and R requested that attached letters and components be reviewed. If there were some components, I don't recall.

Q. You have no personal recollection?

A. That is right.

Mr. Kelley: Your Honor, may I read a portion of these exhibits to the jury?

The Court: Yes. Read any part you wish.

Mr. Kelley: Having reference to Plaintiff's Exhibit 23, from S. Buchsbaum and Company by Chester Buchsbaum, to "Commanding General, Air Materiel Command, Wright-Patterson Air Force Base, Dayton, Attention Lieutenant J. Mitchell, 33 0 38 174 38, D-1 kits. Gentlemen: Manufacturing and assembling of the D-1 kits. We ask permission to use the following merchandise which is guaranteed to meet all government specifications and is in first-class condition, which, of course, will be subject to the inspection of the Air Force inspection." Going down further in the letter: "We ask permission to use sun goggles as per the attached samples that have been made in accordance with specifications 74-G-76-35 and 74-G-76-38."

I would like then to read the Comment 1 which is the first comment on Government's Exhibit 25, which is printed. It says, "Routing and Record Sheet. To MCRE-XD-7. From MCPPXG 43. Attention Mr. Hollifield. Date 11, January 1951. Comment 1: 1. Request that attached letters and components be reviewed and your recommenda-

tions returned to this office. Enclosures: Letters and Comp."—components. Signed by Lieutenant Mitchell.

Q. After receiving the letters, Government's 22 and 23, and the attached samples, it became your official duty to do what with respect to them?

A. Well, I would forward them to the lab. that had cognizance over that type of item, so they could make a determination whether or not the items were acceptable for use in the kits.

Q. This amounted to a request for a deviation, did it not?

A. Well, if they were approved, it would be a deviation.

Q. It became your official duty, when you received the letters, you had to send them to what lab.?

A. To the applicable lab. In that case it would be to the Aero Medical Lab., Survival Section.

Q. You marked it to the attention of Mr. Hollifield, did you not?

A. That is right.

Q. You knew him to be the unit chief of the Land Survival unit in that lab.?

A. That is right.

Q. Did you know, as official government buyer, on this Buchsbaum contract,—did you happen to know who was the project engineer in charge of the D-1 kit, in the Land Survival unit, under Mr. Hollifield?

A. All my dealings were with Mr. Murray.

Q. He was project engineer for the D-1 kit?

A. That is correct.

Q. And having conceived it to be your official duty to send these samples and these letters down to the Aero Med. Lab., did you prepare an R and R in connection with it?

A. Yes. That R and R you showed me is the one.

Q. Government's Exhibit 25 is the one you prepared in connection with the government's request?

A. May I see it a moment? (After looking at Plaintiff's Exhibit 25): This is the R and R I prepared.

Q. Did you receive a reply to the request contained in your R and R?

A. I did.

Q. Does that reply appear as a part, the latter part of the exhibit, Government's 25?

A. It appears as Comment 2 to the original R and R that I prepared, under Comment 1.

Q. Who initiated Comment 2? What person initiated Comment 2?

A. Mr. Murray.

Q. That is the same Mr. Murray who was the project engineer on the D-1 kit?

A. That is correct.

Q. Having reference to Exhibit 25, what recommendation does Mr. Murray make as to the sun glasses in response to your request?

A. "Goggles, Sun, Type 1. Sample submitted by subject company as war surplus and not manufactured in accordance with specification MIL-G4085 but is acceptable for D-1 kit usage."

Q. To your knowledge, in connection with this contract for which you were buyer, were requests for deviation made involving the request to use an item not in spec. in other cases?

A. I don't follow you.

Q. I better strike it. I don't think I understand it myself. As buyer in connection with the D-1 contract, the S. Buchsbaum contract, are you aware of any other requests for deviation other than the request contained in these letters of the 8th?

A. No, I am not familiar with any other requests. I know there were some changes.

Q. Have you, at my request, examined the official files of the Air Force to determine the number of contract change notices that were issued in connection with this S. Buchsbaum contract?

A. I have.

Q. And how many were issued?

A. On contract 18136 there were sixteen; contract 17438 there were eighteen.

Q. And the request of Mr. Buchsbaum incorporated into the letter of January 28th is but one of those; is that correct?

A. That is correct.

Q. Now, when you prepared Government's Exhibit 25, which you say is an R and R dated January 11th, signed by you and addressed to Mr. Hollifield, how did it get, along with the samples, to Mr. Hollifield? Did you walk it down or how did it get there?

A. Put it in the mail.

Q. Now, when that was received by Mr. Hollifield, you being the official buyer under that contract, it became Mr. Hollifield's duty to do what with respect of it?

Mr. Aug: Objection.

The Court: I will sustain it.

Q. Having reference to the S. Buchsbaum and Company contract for the D-1 kit, within your knowledge, what are the facts as to the urgency for completion of that contract?

A. Well, there were five thousand kits on the purchase request, 2500 of which were on project hold off and 2500 were for normal procurement.

Q. You say 2500 were what?

A. 2500 were for project hold off and 2500 were for normal procurement.

Q. You say "project hold off"?

A. That is correct.

Q. Can you explain the significance of the words "project hold off"?

Mr. Aug: We will object, your Honor. The witness is being interrogated as to whether the project is urgent or whether it was not. He can state that without going into what "hold off" is or what it isn't. Getting again far afield.

Mr. Kelley: I don't know what the government is worried about. It is right in the contract.

The Court: Answer the question.

A. "Project hold off" was a classified project like the Manhattan project of A. E. C. and different items that—in this case there was an A-1 priority in procurement.

Mr. Kelley: Would you read the last answer of the witness, please?

(Thereupon, the last A. was read by the reporter.)

Q. I show you Government's Exhibit—

Mr. Kelley: If your Honor please, I realize there is no need for this witness—I don't want to take the time to pass among the jury. I would like to bring out something on the exhibits in evidence. The simplest way would be to ask the witness.

The Court: All right. It is in evidence.

Q. I show you what has been marked as Government's Exhibit 5 and ask you if you see therein the term "Project hold off"?

A. I do.

Q. You said a moment ago "project hold off" meant a 1-A priority. What do you mean by "1-A priority"?

A. We spent most of the time on our hold-off projects, which had priority over everything else, at that time.

Q. What does "1-A priority" mean?

A. It was the hottest deal we had at the time.

Q. What do you mean by "hot"?

A. Had your pressure on it to get it out.

Q. I show you what was received in evidence, marked as Government's Exhibit 6. Can you identify that?

A. It is a purchase request.

The Court: Can you identify it?

The Witness: I can.

Q. What is it?

A. It is a purchase request dated 31 July 1950 for 10,000 E-1 sustenance kits.

Q. Those are D-1?

A. E-1.

Q. So I am clear, I will go back now and show you again Government's Exhibit 5. To what kits does that relate with the Project Hold Off?

A. To the D-1.

Q. Now bringing again to your attention Government's Exhibit 6, that relates to the E-1?

A. That is correct.

Q. What is the fact within your knowledge as to the urgency of the E-1 kit?

A. As I recall it was a Project Hold Off also.

Mr. Kelley: Your Honor, I should like to read the 12th page of Government's Exhibit 6 relating to the E-1 kits.

The Court: Yes, you may, of course.

Mr. Kelley: Typewritten page marked "confidential" stricken out. "Confidential" stricken out. In pencil thereappears figures 7-9-50. In typewriting "Emergency purchase clause 13-C." Beneath that is NCPR. Over to the right of that is MCMS. Paragraph 1. It is requested that Emergency Purchase status and highest possible priority be afforded clause 13-C P. R 118432, covering 10,000 each sustenance kits, long range, individual. Spec. MIL-S-6212. Procurement of the subject items has been directed by Headquarters U. S. A. F. to meet special and urgent strategic Air Command requirements for escape and aviation type kits, etc. of that command."

"Paragraph 2. The Air Force does not have in stock or on procurement any long range individual sustenance kits similar to or approaching the type covered by the Sight purchase request."

You may cross-examine.

Cross-Examination, by Mr. Aug.

Q. Captain, you said that all of your dealings with the Aero Lab. were with Mr. Murray. Wasn't that your—

A. I said my dealings with Mr. Murray were on the D-1 kits.

Q. Now this Plaintiff's Exhibit No. 25, the subject of which is 18136 and 17438 contract, is a memorandum which you have identified as having issued pursuant to the letters of Buchsbaum dated January 8th. Is that correct?

A. Yes.

Q. Now you call this, however, despite your statement, to the attention of Mr. Hollifield, do you not?

A. Correct.

Q. So that all of your dealings with respect to the D-1 kit were not with Mr. Murray.

A. Mr. Hollifield was unit chief up there.

Q. As such, was he the boss of Mr. Murray? Is that correct?

A. That is right.

Mr. Aug: No further questions, your Honor.

Mr. Kelley: That is all, Captain. Thank you.

Mr. Kelley: Your Honor, may we have a five-minute recess? I have to sign an affidavit and we usually have five minutes at this hour.

The Court: Take a little recess.

Mr. Kelley: Five minutes.

The Court: Before you Gentlemen leave would you wait just a minute, please. Members of the Jury, we will take a little recess for a few moments. Before I take the recess, you may be excused and retire to the jury room. Don't come back until we send for you, please.

Thereupon the jury retired from the court room and the following was out of the hearing and presence of the jury:

The Court: The reason I asked you to remain is this: I don't know whether the defendants are approaching the time of the close of their case or not, but before you do formally rest, I would like to make a statement to counsel in the record, in the absence of the jury. I will not do

that until you tell me that you have your case all in. You don't have to tell me that now.

Mr. Kelley: Your Honor, we have no hesitation in stating that we will rest this afternoon. At the moment I consider putting on only one more witness. We have certain offers to make in the record and we will have another motion to make before we rest, but it will be accomplished this afternoon.

The Court: That is all right. You get up and say "Defendants rest" and I don't get a chance to make any statement. When you get around to that point, I will make my statement. I would rather the jury not be here when I make that statement, but I want it in the record. I am not hurrying counsel. You let me know when you are ready.

Thereupon a short recess was had.

And thereupon (in the presence of the jury)

ALVIN WALTER CLEMENS, being duly sworn, testified as follows:

Direct Examination, by Mr. Kelley.

Q. Would you please state your full name?
A. Alvin Walter Clemens.
Q. Where do you reside?
A. In Centerville, Ohio.
Q. What is your present occupation?
A. I am treasurer of Cappel-MacDonald and Company.
Q. As such, are you also the custodian of certain of its official records?
A. I am responsible for the accounting records that pertain to the corporation.
Q. Was there served upon you a subpoena duces tecum requiring you to be here and bring with you certain documents?

A. There was.

Q. And have you brought those documents, sir?

A. I have.

Q. Would you produce them?

A. (Witness does as requested by counsel.)

Mr. Kelley: Mark these CC, DD and EE.

Thereupon two invoices and a voucher check were marked for identification as Defendants' Exhibits CC, DD and EE, respectively.

Q. I show you what has been marked for identification Defendants' Exhibit CC and ask whether or not you can identify it.

A. I can.

Q. What is it?

A. It is an invoice from W. J. Opper to Cappel-MacDonald and Company for 14,200 ski-mountain goggles.

Q. What is the date on it?

A. The date of the invoice is November 18, 1950.

Q. What is the unit price?

A. The unit price is $1.40 each.

Q. And the extension total price?

A. Extension total price is $19,880.

Q. I show you what has been marked for identification as Defendants' Exhibit DD. Can you identify that?

A. I can, as an invoice from W. J. Opper, Chicago, Illinois, to Cappel-MacDonald and Company, for 14,200 magnetic compasses, at 48 cents each, a total of $6816.

Q. I show you what has been marked for identification as Defendants' Exhibit EE. Can you identify that?

A. I can.

Q. What is it?

A. This is a copy of our voucher check.

Q. In payment of what?

A. In payment of the two Exhibits CC and DD.

Q. Now, all of these instruments that you hold now in your hand are original documents, are they not?

A. That is correct.

Q. Have you prepared photostats of each of those documents?

A. I have.

Q. For the purpose of substituting the photostats for the originals, the photostats to remain in this record, the originals to return to your files?

A. That is correct.

The Court: I don't think there is any objection to the exhibits themselves.

Mr. Aug: There will be, your Honor.

Mr. Kelley: I haven't offered them yet.

The Court: There is no objection to the substitution.

Mr. Kelley: All right. At this time I offer in evidence what has been marked for identification as Defendants' Exhibits CC, DD and EE.

Mr. Aug: Your Honor, we object to the Defendants' Exhibit DD. We make no objection to CC or EE. Defendants' Exhibit DD has relation to magnetic compasses with which this case is not concerned.

Mr. Kelley: We will withdraw the offer. There was one voucher to pay two invoices. We will withdraw our offer in evidence of the exhibit relating to the compasses, DD. Its only purpose was to support the joint voucher.

The Court: You will offer CC for identification?

Mr. Kelley: And EE.

The Court: Is there any objection to them?

Mr. Aug: None to those two.

The Court: Very well. Then Defendants' Exhibit DD heretofore marked for identification is now admitted in evidence and Defendants' Exhibit EE is now admitted in evidence.

Thereupon the following exhibits were admitted in evidence:

Invoice from Opper to Cappel-MacDonald, dated Nov. 18, 1950, as Defendants' Exhibit CC.

Voucher check as Defendants' Exhibit EE.

Mr. Kelley: I ask leave to substitute a photostatic copy in the record of Exhibit CC.

The Court: That may be done.

Mr. Kelley: I ask leave to substitute a photostatic copy in the record of Defendants' Exhibit EE.

The Court: Yes, sir.

Mr. Kelley: You may cross-examine.

Mr. Aug: No cross-examination.

Mr. Kelley: Thank you. That will be all.

The Court: That is all, Mr. Clemens.

Mr. Kelley: Your Honor will recall that when the witness John DeNeale was on the stand as a witness for the government, I requested that he produce for me FBI reports which he had dictated directly from his notes of defendant Hollifield. Your Honor suggested in open court that we address a request to the Attorney General of the United States asking leave that they be made available to us so we could examine them and determine whether or not there were any statements there not in harmony with his testimony. We did direct such a telegram, which I have had marked for identification.

Thereupon a telegram to the Attorney General and a telegram to Frank Svoboda were marked for identification as Defendants' Exhibits FF and GG, respectively.

Mr. Kelley: GG is a telegram to the Attorney, Frank Svoboda, from the Attorney General. Defendants' Exhibit FF for identification is a telegram to the Attorney

General requesting that he consent to the disclosure of those reports. His reply constituted a categorical refusal. I should like to make these a part of the record in the case, if I may, I should like to offer those.

The Court: Have you seen those?

Mr. Aug: No, your Honor.

Mr. Kelley: I will show them to him. (After showing telegrams to opposite counsel:) Defense offers Defendants' Exhibits FF and GG in evidence.

Mr. Aug: We will object to the offer, if the Court please.

The Court: Do you object?

Mr. Aug: Yes, your Honor. We are objecting to the offer of FF and GG in evidence.

The Court: I will overrule the objection. These telegrams marked FF and GG for identification may be admitted in evidence. However, I wish to instruct the jury that they are not evidence as bearing upon the issues being tried in this case. The question did come up, as you no doubt recall, exactly as Mr. Kelley has stated. I told counsel I thought they should make their request of the Attorney General of the United States, which apparently they did and they received an answer from him and as a verification of that and for that purpose only, I will let those go into the record, in fairness to counsel. I think the record should show that they did do what the Court suggested, but so far as the case itself is concerned, that is the merits of the controversy of this case, those telegrams have nothing to do with it at all and you are not to consider them as bearing upon the merits of the controversy. I think it is only fair to them that they should be placed in the record as exhibits and I overrule the objection.

Thereupon said telegrams were admitted in evidence, the one to the Attorney General as Defendants' Exhibit

FF and the one to Frank Svoboda as Defendants' Exhibit GG.

Mr. Kelley: Your Honor, within the limited purpose just expressed by the Court for which these may be considered, may I read them to the jury?

The Court: Certainly. They are in evidence now.

Mr. Kelley: Defendants' Exhibit FF reads as follows: "To Attorney General, United States, Department of Justice, Washington, D. C. Re Criminal Case 2669, United States vs. Robert G. Hollifield, Sr., and William J. Opper. United States District Court, Dayton, Ohio, now being tried before Honorable Robert R. Nevin, District Judge. Please be advised Special Agent John DeNeale, FBI, testified this morning that in preparing for testifying as government witness he refreshed his recollection last night by reading several FBI reports prepared by him in an official capacity during his investigation of this case. Stop. Demand made by defense counsel in open court that witness DeNeale produce for inspection of Court and defense counsel all FBI reports used by DeNeale to refresh his recollection. Stop. Presiding judge stated in open court in presence of jury that defense counsel should make direct request of United States Attorney General that he issue directive to DeNeale requiring DeNeale to produce said FBI reports for inspection of defense counsel. Stop. By this telegram we respectfully request that you authorize and direct DeNeale accordingly."

I read Defendants' Exhibit GG, addressed to Frank Svoboda, Esquire, Attorney at Law, Dayton, Ohio.

I meant to say that this Defendants' Exhibit FF was signed "Frank Svoboda, Attorney for Defendant Robert G. Hollifield, Sr., Francis C. Canny, Attorney for Defendant William J. Opper."

I read now from Exhibit GG: "Re your night letter May 23, United States v. Hollifield and Opper. Acting for the Attorney General I cannot accede to your request

that special agent DeNeale produce FBI reports since they are confidential records of the Department of Justice. See Department Order No. 3229 published in 11 Fed. Reg. 4920. See also Goldman v. United States, 316 U. S. 129, 132, and Tougy v. Ragen, 340 7 462. James M. McInerney, Assistant Attorney General, Washington, D. C."

Your Honor, at this time we should like to approach the bench with government counsel.

Mr. Aug: Your Honor, I think defense counsel has gone as far as they should with this. I would like to, on behalf of the government present to the Court for introduction in evidence an instrument which I think explains the position of the government with respect to disclosing those confidential files. Mr. Kelley has referred to the exhibit lettered GG as being a categorical denial of their request.

The Court: I will strike that out. Members of the Jury. This is not the time to comment on that. I didn't understand.

Mr. Kelley: I did use that phrase.

The Court: Counsel were to read to you just what was in there without any comment.

Mr. Kelley: I didn't make that then; I made it earlier.

The Court: I will explain to the jury—I think they understand it. I know you understand it—this has nothing to do with the issues being tried before you, but this question came up and I think, as I said before, and I still think, it is only fair to counsel that they put this in to show that they made the effort and the Attorney General of the United States said "No, you can't do it because of a certain bulletin and a certain ruling by the courts" to which he refers in his telegram.

Mr. Aug: Now, your Honor, I have in my possession a letter under date May 1, 1952, from the Department of Justice to all United States Attorneys, under the subject

"Safeguarding reports, records and files" the position of the government with respect to opening up these confidential files and I would like to have this instrument marked for identification and introduced in evidence, so I will be permitted to read portions of it to the jury.

The Court: No. You may do this: You may have it marked for identification at this time.

Mr. Aug: Very well.

The Court: When we come to rebuttal, if you think it is something you ought to introduce, you may do so. Or, if it becomes necessary, we can open up your case in chief. At this time, you can only mark it for identification.

Mr. Aug: Very well.

The Court: That will be Government's Exhibit No. 52.

Thereupon an order, No. 3229, Supplement No. 3, dated May 1, 1952, was marked for identification as Plaintiff's Exhibit No. 52.

Mr. Aug: I will identify this, if the Court please, as an order No. 3229 Supplement No. 3, dated May 1, 1952, from the Department of Justice, Washington, D. C., to all United States—

Mr. Kelley: Just a moment. I think it is not in evidence until it has been offered.

The Court: I don't think you should go into it now. It is marked for identification. After the defendants are through, you can take it up, if you care to. (After counsel for both sides confer with the Court out of the hearing of the jury:) Members of the Jury, would you be kind enough to retire for a little while to the jury room? We will send for you in a few minutes.

Thereupon the jury retired from the court room and the following proceedings were had out of the hearing and presence of the jury:

The Court: Now, earlier in the day I stated to counsel for the defendants, to all counsel, that before the defendants rest I would like to make a statement and that I wish to do. I mention it now because I understand that defendants are approaching at least the end of their testimony.

Mr. Kelley: We have one more thing to accomplish before we reach that stage and in that connection I have just this moment furnished to the United States Attorney a copy of a motion for continuance, which I will now file with your Honor, and like to have made a part of the case, together with an affidavit in support thereof, and it is my understanding that—

Mr. Svoboda: I will do the same for Robert Hollifield.

The Court: It isn't necessary to argue these motions.

Mr. Kelley: I have one other item I would like to hand up to your Honor. I would like to have it marked for identification HH.

Thereupon a letter dated May 13, 1952 was marked for identification as Defendants' Exhibit HH.

The Court: The motions and each of them are overruled. No use to argue them. This case was set down for trial sometime ago. I don't know exactly when. I don't know how long Captain Murray has been in Germany, but at any event, counsel could long since, not at the last minute, after the jury has been impaneled and sworn and we are ready to close the trial, notified the Court, the government or both of us about their desire to take the deposition of Captain Murray, or arrange to have Captain Murray come here. Of course, they could have his deposition taken, but at this time under all the existing circumstances, these motions should be and are overruled.

Counsel for the government, since they are going to be filed, will please prepare in that respect, orders, submit them to counsel.

Mr. Kelley: Your Honor ruled before I was able to hand up one other document in connection with this motion. May I have the opportunity to do that?

The Court: Yes, certainly.

Mr. Kelley: Your Honor, I have requested the reporter to mark the document I hold in my hand as Defendants' Exhibit HH for identification. It consists of a letter dated May 13, 1952, addressed by defense—supported by an official registered return receipt, a letter directed by defense counsel to the Commanding General of the Air Materiel Command, requesting that he return to this country, Mr. Murray. Mr. Murray is a member of the Air Force. As such, it would have done us no good at all to apply to this Court for a continuance in the trial. We haven't waited until the last moment. We applied at the place where your Honor earlier in this case said we would have to apply. He is a military man and you stated from the Bench you have no control over him. He is a material, an important witness. We have not been asleep. We wrote that the 13th of this month.

The Court: Let that be filed. The motions are still overruled, both of them.

Mr. Kelley: If your Honor has something to say when the defense rests, I would suggest he say it now.

The Court: Gentlemen, there have been marked two exhibits in this case, Exhibit No. 37 for identification and Exhibit No. 38 for identification. These exhibits were offered in evidence by the government in their case in chief. Exhibit No. 37 for identification was offered when the witness Noble was on the stand, who, incidentally, has since been back as a witness for the defendants, or called by the defendants. Exhibit No. 37 for identification is a written statement signed by Mr. Hollifield, defendant Hollifield. Exhibit No. 38 for identification is also a written statement signed by defendant Hollifield.

The government offered these two exhibits in evidence. At the time they offered them in evidence, they stated that these were certain portions of these exhibits, respectively, which they, the government, felt were not pertinent to the issues being tried here and they had and did therefore temporarily delete by putting paper across, attached with brads, those portions of these statements which the government said they did not care to introduce.

I stated to counsel for the defendants at that time, as I think the record will show, that when they came to the defense, if they wished to offer any part or all of these statements in evidence, they had the perfect right to do so. Counsel for the defendants said that in their opinion there were other parts of these statements that were pertinent and they thought they ought to have the right to introduce them in evidence and I think so too. I think they have the perfect right to do that. But they haven't offered any part of of it in evidence. So the statements stand here with the deletions temporarily made.

Now, I propose to admit these two written statements in evidence. I have waited until the defendants had an opportunity to read or to have the witness Noble testify, or the witness Pardo, who is the witness of Exhibit 38 for identification testified, as to so much thereof or all thereof as the defendants claim were pertinent to their case. I did not intend to rule on what was pertinent to defendants' case. I intended to leave that up to defendants themselves, to put in any or all of this that they wished to put in.

Now, since the defendants have come to the close of their case, I will admit in evidence so much of Exhibit 37 for identification as the government has offered and I will admit in evidence and it now becomes Government's Exhibit 37 in evidence. I will admit in evidence so much of the Government's Exhibit 38 as the government has offered and the government will have to use your own devices about the mechanics of this thing. I don't intend to do that. I have no mechanical skill. I want those parts that

are deleted, deleted in such a way not as to destroy the document, you understand, but as to permanently delete those portions which you have heretofore deleted and which the defendants haven't evidently had any desire to offer in evidence and, therefore, I assume I have the right to assume that they do not care to put any other part of the statements in evidence. Consequently, these two exhibits insofar as the government has offered them, with the deletions, however, to be made in such a way that they cannot be seen by the jury.

In the meantime, the record will show, I am sure, this is true, that these documents as a whole were submitted to counsel for the defendants with the privilege and understanding that they could read every word of them, which I have no doubt they did. At least, they had that opportunity. Having had the opportunity and not desiring to put any part on the exhibits in evidence beyond that which the government has already offered, they now will go in with the deletions made in such a way as to leave out from the written documents so much thereof as has been deleted.

Mr. Kelley: Of course, the record will speak for itself. It is not my recollection that at any time during this trial that I ever told your Honor that I believed certain deleted portions ought to go into evidence. I said I wanted to see it all and determine for myself if I felt there was anything relevant. I didn't say that I felt there was something relevant. May I ask your Honor if you have read those exhibits in their entirety?

The Court: I don't know a word that is in evidence and I don't care to know.

Mr. Kelley: Let me make the position of the defendant Opper clear. I did insist only on the right to examine them in their entirety, to determine for myself if probably any of the deleted matter was relevant and material to the issues of this case. I was afforded that opportunity. I

never expressed the thought or belief that some deleted portions were relevant and I now say that having examined them, I do not consider them to be relevant and material to the issues of this case. I accent the word "this" for that reason. Those are statements of the defendant Hollifield and the Court has now, for the first time, admitted them in evidence. In that way I feel we should wish once more that the Court admonish the jury that anything they read here may not be considered against Mr. Opper.

The Court: The jury will not be admonished any more until I admonish them in my charge.

Mr. Kelley: All right.

The Court: Which, of course, I intend to do.

Mr. Kelley: Now, I have this to say: Since I am objecting to their introduction, the record will make that clear that we do object to their introduction. I make this only as a suggestion to the Court: Since the Court insists and properly so that government's counsel undertake by some means to delete those portions so that it will not be possible for the jury to see them. The defendant Opper would not object, saving, of course, his objection to their admissibility as a whole, that they be photostated and thus there can go to the jury a photostat only of what the government has offered, would not destroy the original document in any sense and would serve the purpose admirably.

Mr. Aug: We feel we can delete the portions of the confession which have been previously deleted in such a manner as to not reveal their contents to the jury.

Mr. Kelley: That will have to be done to our satisfaction.

Mr. Aug: We will work together on that.

The Court: As I say, you will have to work out the mechanics. I am not going to try to do that, but I don't think that any portion of this—these two statements

should now be—that have been deleted, I don't think the jury should have access to them at all. The Court has not read them. I haven't the faintest idea what is in those statements beyond what the government already put in the record. I did not, however, want to do anything further about it until I found out if defendants were not going to use them. When Mr. Noble was called here the other day, I must say I personally thought he was going to be asked about that statement. Not a word was said. Of course, it was quite all right. It was not the Court's business. But these are now admitted in evidence and you may, if you think you can, Mr. Aug, delete this in such a way as to let them have the original documents, with the original signatures on, with such changes as appear in them, because I think they are important too, why, that is all right. But you must delete them in such a way as that the jury can't see what is deleted a bit more than the Court can see it and I don't care to see it. I will give them back to you at this time and I will leave it up to you to work out some mechanical way. Don't destroy the rest of it. Sometime it may be important. I don't know. We don't want to cut it or anything of that kind.

Mr. Aug: Very well, your Honor.

The Court: Now, Gentlemen, before—

Mr. Kelley: The only other thing we would like to do, we haven't had that opportunity at all—it will take about five minutes—we want to look at the defense exhibits. This is to see for certain which are in evidence and which are not; to make sure there isn't something we have overlooked that we want to offer. If we could have five minutes for that. I think five minutes would serve the purpose.

The Court: That is quite all right. Let me ask the government if the defendants should rest this afternoon, will there be any rebuttal on behalf of the government?

Mr. Aug: We are not contemplating any, your Honor, and in this same five minutes, we will reconsider our thoughts on that—we will probably come to a conclusion about that.

The Court: I will wait here five minutes while you Gentlemen are doing that.

Mr. Kelley: The defendant Opper desires to withdraw the exhibit marked for identification HH, so that the same may be attached to and made a part of defendant Opper's motion and that the same may relate with equal weight to defendant Hollifield's motion for continuance.

If the Court please, the defendant Opper offers in evidence—May I ask this: In the Court's final charge, do you propose to refer specifically to these exhibits from the standpoint of admonishing the jury?

The Court: Three of them: 37, 38 and 41. 41 is Mr. Opper's statement. I certainly intend to refer to that specifically.

Mr. Kelley: All right.

The Court: Now, Gentlemen, before we bring in the jury, if we close this afternoon, subject to your approval, of course, it is my suggestion that we will recess then the further hearing of this cause until Tuesday, June 3rd. The reason I say Tuesday instead of Monday is, Monday is my regular motion day. The lawyers around here, in this vicinity, know about it. Some of them come from Columbus and Cincinnati and different places, and I can't very well stop that. I couldn't have the jury until 2 o'clock anyhow. Now, I would order the jury back on June 3rd, if that is satisfactory to all of you, and that will give you an opportunity to prepare your arguments, or do anything you please, of course, between now and that time. Perhaps it might be well right now before we call in the jury to talk about the arguments. Is that arrangement satisfactory to counsel?

Mr. Kelley: Very satisfactory to the defendant Opper.

Mr. Aug: Satisfactory, your Honor.

The Court: If that is the situation then when we come back on Tuesday morning, we will be ready to start in with the arguments.

Mr. Kelley: We should like to make some motions at the close of government's case, but we will not wish to argue.

The Court: We can do that this afternoon.

Mr. Kelley: It always appears to me that defense counsel at the end of a case should be given a little time to think and be sure they are not omitting some motions they should make. We have been concerned with getting the testimony in. We would rather do that Tuesday. It will be brief and we don't care to argue.

The Court: I have no objection, of course. I do want to have some idea, get some idea from counsel. I have my own ideas but I am not expressing them until I hear what counsel wishes to say.

Mr. Kelley: On behalf of defendant Opper, I should like to be assured—I speak for my associates and myself—we should like to be assured of two hours' time to sum up on behalf of the defendant Opper. We do not mean to state that we will use that time, necessarily, but we should like to have that time afforded us.

The Court: Well, now, see if I understand it correctly. The defendants will take two hours.

Mr. Kelley: No. The defendant Opper would like two hours.

The Court: No. I will tell you, Gentlemen, I am only going to devote all day Tuesday to these arguments and on Wednesday morning, I expect to charge the jury. I have another jury coming in here Wednesday morning with another criminal case set to follow immediately after this

case. As soon as this jury walks out, the other jurors will be impaneled in another case. All these jurors have been ordered in here for the 4th. Now, you can have all day. I mean all the court day on Tuesday, the 3rd day of June. I will allot each side two hours. You don't have to use all of the two hours, or you can use all the two hours, as you please.

The government will have two hours and the defendants will have two hours.

Now, Gentlemen, I do not wish to be arbitrary but after all, I think we should be a little humane, because these twelve jurors, or fourteen, as a matter of fact, have to sit here during all that time and listen to what is being said, and I think that they have some rights to be respected too in a matter of this kind.

Be that as it may, I will give you all day on Tuesday. Each side may have two hours. You may divide it between yourselves, as you please. One counsel may make all the argument, as far as the Court is concerned, or all of you together make arguments, as you please, for the respective parties. I do not think that is arbitrary. I think that is long enough for any case to be argued and this case has taken some days with the testimony. Probably it could have been put in in quicker time. But be that as it may, we do not want to take too much time on Tuesday morning for these motions. As I understand, they will be presented following up the motions that have already been presented, which is quite all right, to keep the record straight. As promptly as we can then, why, we will start immediately on the arguments. Counsel on both sides may divide the time as you see fit.

Now, Gentlemen, one thing more. Way back in the early stages of this case I asked counsel on both sides if they cared to have any special charges to submit to the Court. I haven't received any yet. Perhaps you don't have any. It isn't necessary. I don't require that you give me any special charges. I am simply giving you the opportunity which the rules state the Court should give you. But you

see, if you come here Tuesday morning with a lot of special charges, well, then there is another hour or more gone, if we are going to object to the special charges on either side. We will have all of that time taken out. I thought and believed and hoped anyhow that you would be able to have these special charges at least so I could have them over this weekend.

Mr. Kelley: As far as the defendants are concerned, I think I can speak for both of them, they certainly will not be many. We can count them on the fingers of one hand. But we simply haven't had time to devote to them. Would it be sufficient if we had them in your Honor's hand Monday morning?

The Court: Yes, plenty of time. I would have no objection to this, Gentlemen: If you will have your special charges here say by noon or one o'clock on Monday. Then Monday afternoon, if any of you care to come in, all of you, of course, if you wish, and present your objections and so forth, I will be glad to dispose of it, because when I get through with my motion docket Monday morning, I will have the afternoon free and I would like to have the benefit of your thoughts and let you know what I am going to give in those respects, before you argue the case, so you can have the benefit in your arguments.

Mr. Kelley: I am not familiar with the custom of this Court. Does your Honor refer only to a knowledge on our part to how you will deal with our suggested charges, or will you make apparent to us what your charge is going to be, your entire charge?

The Court: No. When you submit your special charges, if the government objects to any of them, I will hear counsel as to whether or not Charge No. 1 should be given. If I conclude to give it, I will say so, and then you will know that will be in my general charge. I won't give them as special charges in advance. I don't think that is contemplated by our practice in the Federal Court, but I

will incorporate it, if I tell you that I will give Special Charge No. 1, whatever it may be, that will be incorporated in the charge and you may argue that to the jury, if you wish, that the Court will charge you thus and so. And the same way with the government. I don't know if they will have any or not, but if they do, whatever they are, I would like to have you—

Mr. Aug: If we have any, they will be very few and we too can count them on one hand.

The Court: That is good. That is ten altogether. Suppose I do this: Suppose I set Monday afternoon, June 2nd, at 2 o'clock to hear counsel on any special charges, that is, any objections to any special charges; if neither side objects why, of course, I don't suppose I will have any objection to it myself, if counsel don't object. I did say to counsel, to conserve your time as well as the Court's, it isn't necessary for you to take the time to write out a special charge that the defendants are presumed to be innocent. If I don't know enough about the law, haven't got sense enough to put that in my charge, then I won't have anything to say at all. Of course, I will charge that and all that sort of thing. The jury is the sole judge of the facts, of course, I will charge that. It is not necessary for you to take time and trouble to write those things out. Of course, you can do so if you wish, but I think it is taking up your time without it being necessary.

But there may be some things in the case, and if you wish to add, to supply me with something on behalf of the defendants, respectively, which you think I should charge with regard to these statements, I will be glad to have that and consider it along with what I have already said, and what I now expect to say. Still I will have the benefit of your thought and advice on the thing too. I would be very glad to have that, if you care to put that in the form of a special request.

I think that covers everything now. Now we will call in the jury. Of course, you can't rest.

Mr. Kelley: I have certain exhibits I want to offer in evidence when the jury comes back.

The Court: And then I think you should rest in the presence of the jury and I think the government should too, if that is what you are going to do.

Very well. Bring in the jury.

And thereupon the jury returned into the court room and the following proceedings were had in the presence and hearing of the jury:

Mr. Kelley: May it please the Court, the defendant Opper offers in evidence the following exhibits which have heretofore been marked for identification, as defense exhibits A and A-1 and A-2. A is described as the E-1 kit bid from S. Buchsbaum and Company, dated 10/15/50. A-1 and A-2 are pages of that exhibit A.

Mr. Aug: The government objects to the admission of Defendants' Exhibit A, your Honor. It is a rejected bid Buchsbaum made for the E-1 kit and has nothing to do with this case.

Mr. Kelley: I can state its relevancy.

The Court: I will have to go back and look into this now.

Mr. Kelley: Shall I continue? There are four others I wish to offer now. I might list them and then your Honor might consider them altogether.

The next is B. B is described as a purchase inquiry, dated October 7, 1950, to William J. Opper, from the S. Buchsbaum and Company, Chicago, Illinois. And we offer in evidence Defendants' Exhibit C for identification, which is a letter identified as a letter from Cappel-MacDonald and Company to Mr. Opper concerning purchase order F-5506-G, which is in evidence.

We offer in evidence what has been marked for identification Defendants' Exhibit D, which has been identified as photostatic copies of a letter to Cappel-MacDonald and Company, signed by Harry A. Chance, contracting officer.

dated December 5, 1950. That is in relation to the Cappel-MacDonald contract.

We also offer in evidence what has been marked for identification Defendants' Exhibit D-1 which are photostatic copies of a letter dated December 5th from Harry A. Chance, Contracting Officer. D-1 consists of the second page of the letter. The first page is D; the second page is D-1. So, they really constitute but one letter.

So, in sum we have offered in evidence A, A-1, A-2, B, C, D and D-1.

Mr. Aug: Your Honor, we make no objection to Defendants' Exhibit A.

The Court: Defendants' Exhibit A.

Mr. Aug: Which includes A-1 and A-2.

The Court: All right. Defendants' Exhibit A for identification is admitted in evidence and is now in evidence in the case as Defendants' Exhibit A, which I understand has two pages marked—

Mr. Kelley: It has more, but it includes two particular pages which were marked A-1 and A-2.

The Court: That is in evidence.

Thereupon said letter from Buchsbaum, dated 3 Oct. 1950, was admitted in evidence and marked as Defendants' Exhibit A, A-1 and A-2.

Mr. Aug: B is a purchase inquiry to which we object to its introduction. There is nothing on this purchase inquiry which relates to goggles. It relates to compasses. I object to it on the basis of irrelevancy.

Mr. Kelley: The Court will recall when Mr. Chester Buchsbaum was on the stand in connection with determining when and under what circumstances he became acquainted with Mr. Opper this was produced and demonstrated that the Buchsbaum Company itself sought Mr. Opper out, sending him this purchase inquiry.

The Court: It may be admitted in evidence marked as Defendants' Exhibit B in evidence.

Thereupon said purchase inquiry, dated Oct. 7, 1950, was admitted in evidence, marked as Defendants' Exhibit B.

Mr. Aug: We have no objection to exhibit C.

The Court: No objection?

Mr. Aug: No, your Honor.

The Court: Exhibit C for identification is now marked in evidence as Defendants' Exhibit C.

Thereupon a letter dated Dec. 8, 1950, from Cappel-MacDonald and Company to Mr. Opper was admitted in evidence and marked as Defendants' Exhibit C.

Mr. Aug: And no objection to D, your Honor.

The Court: Very well.

Mr. Aug: And D-1, which is a second page of the D exhibit. No objection.

The Court: All right. It is all admitted.

Thereupon a letter from Harry A. Chance to Cappel-MacDonald, dated 5 Dec. 1950, was admitted in evidence, marked as Defendants' Exhibit D, and D-1.

Mr. Kelley: Defendant Opper rests.

Mr. Svoboda: Defendant Hollifield rests.

The Court: Now, Members of the Jury, earlier in the case, in the government's case in chief, as we call it, the government offered in evidence two written statements, each and both of which were signed and are signed by the defendant Hollifield. There were portions of each of those statements which the government stated that they thought were not pertinent to the issues in this case and so I had the witnesses read, or counsel read from Exhibit 37 and Exhibit 38, and had the exhibits themselves marked for

identification, because there were and still are portions of them that were temporarily deleted.

These statements in toto were submitted to counsel for defendants with the privilege and opportunity to remove these temporary pieces of white paper deleting them, so that they could read everything that was said in the statements, and if they wished to offer any part of it in evidence on the defendants' side of the case, of course, they had the right to do so.

Now counsel have stated, and have since now rested their case, that the defendants do not care to offer into evidence or at least have not offered into evidence any portions of these statements that were temporarily deleted. I explained to counsel in your absence a while ago that when everything was in on both sides about these matters, I then proposed that these exhibits heretofore marked for identification should now become Plaintiff's Exhibit 37 and Plaintiff's Exhibit 38 in evidence and I now admit them in evidence. Although I did it before, I admit them now in your presence, with the understanding, however, that the government is to, in some way, I don't know how they are going to do it—I am not going to worry about that part of it. That is something they will have to work out the mechanics themselves. Some way the government is to make the deletions permanent without destroying the document.

In other words, they will go with you eventually to the jury room, but so much of these statements as are covered over, Members of the Jury, are not evidence in the case and must not be read by you, as they have not been read by the Court. I haven't the faintest idea what is in there a bit more than you do. But they are not evidence in the case and must not be considered by you as evidence in the case.

Now, I have told you heretofore and I will tell you in my charge, that anything that is said in these statements, written in these statements by Mr. Hollifield may be considered by you as evidence in the case insofar as the de-

fendant Hollifield is concerned, but not anything as against the defendant Opper.

Also I admitted in evidence earlier in the trial Exhibit No. 41, which is a written statement signed by the defendant Opper. You may consider that. That will go with you to the jury room. You may consider that as evidence in the case, however, only as against the defendant Opper. You may not consider that and must not consider it as against the defendant Hollifield. I will come back to that again in my charge. No doubt counsel will argue it to you. I hope I have made it plain to you, because it is very important, very important that you only consider these statements as evidence insofar as the defendant who made them orally, as some of the witnesses testified to or made them in writing, as shown by Exhibits 37, 38 and 41.

The government will see that is properly deleted in a way that they will see they are not open for inspection, although I know the jury will not look at them if I advise them—charge them not to do it.

Thereupon said statements by Hollifield were admitted into evidence, marked as Plaintiff's Exhibits 37 and 38.

The Court: Now, Members of the Jury, I have kept you—

Mr. Aug: Your Honor, for the purpose of the record, the government would like to state at this time that it too rests.

The Court: All right. Now, Members of the Jury, I have kept you a little bit late tonight, for which I am sorry to say you will not get any overtime, when you work for the government. But I did that for a reason. We have agreed here, counsel and the Court, I trust it will meet with your approval, when we adjourn tonight now we are going to recess the further hearing of this case until Tuesday morning of next week, June 3rd.

Now, the reasons for that are several. In the first place, Friday is a holiday and we, of course, couldn't go on on

that day out of respect for the soldiers, or anything else. But on Monday morning I have my regular motion docket here the first Monday of every month, and I couldn't have you come until the afternoon anyhow, and counsel are going to appear before the Court and argue some legal matters and all that on Monday afternoon. So that you can return, if you please, on Tuesday morning, June 3rd, at 11 o'clock.

Now, Members of the Jury, I can't too strongly admonish you about this case. Now the government has put in everything that they have to present and the defendants have put in everything that they have to present, there will be no further evidence in the case. On Tuesday we are going to spend the whole day hearing the arguments of counsel. That, of course, is not evidence in the case, but counsel on both sides will argue to you the reasons why they think the evidence supports their respective contentions. Then on Wednesday morning I will charge you the law governing the case, as I understand it to be. So that, our present plans contemplate that the case would be in your hands on Wednesday.

So, during this interval bear in mind my admonition: do not permit anybody to talk to you about this case; do not discuss it among yourselves and even yet do not make up your minds, because you have yet to hear what counsel have to say and what the law is, as I shall charge it to you.

You may now be excused. Return here, if you please, at 11 o'clock on Tuesday morning, June 3rd. I hope you have a nice weekend holiday. I will be looking forward to seeing you on Tuesday. The jury may be excused.

Thereupon the jury retired from the court room and the following proceedings were out of the presence and hearing of the jury:

The Court: Now, Gentlemen, I think I have this correct in my mind, if not, I wish you would tell me: We won't come back any of us so far as this case is concerned until

2 o'clock on Monday afternoon and at 2 o'clock on Monday afternoon, why counsel will bring with them such special charges as you have to suggest, if any, and we will dispose of your motions Monday afternoon.

Mr. Kelley: What I propose to do as far as the defendant Opper is concerned and very probably that will be the thing done as far as the defendant Hollifield, we will have written motions and file them for the record, but we will not ask for the privilege of arguing.

The Court: If you do that, that will be fine. All right. Now I imagine, I suppose that the motions will be along the same lines that we have had heretofore. Of course, you want to do that to keep your record straight. That is quite all right. Very well. Now, Gentlemen, I wish you all a nice holiday and adjourn court. I will adjourn court until tomorrow morning, because I have another matter that has nothing to do with this case, you understand. Adjourn court until tomorrow morning at 11 o'clock.

Thereupon court was adjourned until tomorrow morning at 11 o'clock, the further proceedings in this case being adjourned until Monday afternoon at 2 o'clock.

Afternoon Session.

Monday, June 2, 1952.

Court met pursuant to adjournment. Counsel being present as heretofore noted, except Mr. Svoboda was absent, the following proceedings were had out of the presence and hearing of the jury:

The Court: Now do counsel wish to be heard?

Mr. Canny: If your Honor please,—

The Court: Just a second, Mr. Canny.

Mr. Canny: The first matter we would like to take up with your Honor is to open up the defendant Opper's case

for the purpose of filing a motion to strike two exhibits 31 and 44. We realize we have to reopen the case for that purpose and in the interest of justice we would like to have permission to reopen defendant Opper's case to file this motion to strike.

The Court: Let me see which motions we are talking about.

Mr. Canny: That would be the last one filed.

The Court: I have been handed here by the clerk, Gentlemen, in my chambers before coming on the bench a number of motions, among others, the following: —These motions all were filed today, June 2, 1952. Now here is a motion of Mr. Opper at the close of all the evidence to strike.

Mr. Canny: We would like to reopen our case for that purpose, your Honor, for the purpose of filing that motion.

The Court: Well, I don't see how you can very well open your case and at the same time you say "at the close of all the evidence." If you reopen your case, the government still is entitled to put in rebuttal before the evidence is all closed. If you mean by that that you wish to file this motion at the close of all the evidence, I have no objection, or I have no objection to opening your case for the purpose of filing the motion to strike, if you want to, but I don't think it is consistent to have it stand both ways. I will leave that to you.

Mr. Canny: In other words, you say it would be agreeable to file a motion as of now.

The Court: Mr. Canny, I am not directing counsel what to do, excepting to this extent only, that this motion to strike reads as follows: "Comes now defendant William J. Opper, at the close of all the evidence, and moves the Court to strike from the record in this case Government Exhibit 31, Government Exhibit No. 44, together with all the testimony relating to either or both of said exhibits."

Now the only point I make is, if this motion is filed at the close of all the evidence, that means, as I would understand that, when everything is through, including all the defendant has to offer and all that the government may have to offer by way of rebuttal.

Mr. Canny: Your Honor, let the motion stand as is.

The Court: Or, if you prefer to open up your case and strike out the words "At the close of all the evidence," then I will do whatever you want. I have no objection. I am not telling counsel what to do.

Mr. Canny: You are correct, your Honor, in what you say, but I believe that the motion as drawn would be proper, that this is the close of all the evidence, close of rebuttal and all the other testimony that the government might want to offer.

The Court: That motion of Mr. Opper stands as is.

Mr. Canny: As is.

The Court: Very well.

Mr. Richter: We will object to reopening the case at this time.

The Court: They don't ask for that.

Mr. Richter: They are not asking for that?

The Court: No. They are going to leave the motion as it is. The motion would be "Now comes the defendant William J. Opper, at the close of all the evidence and moves the Court to strike" these certain documents, and that will not require any reopening, if counsel wish to follow that procedure. If that is correct, why, then, we have that motion.

Now, I understood from counsel the other day that they did not expect to again argue these matters, all having been argued before.

Mr. Canny: That is correct.

The Court: I will say, however, I would like the record to show that with this motion just referred to there is a memorandum submitted by counsel for the defendant Opper. As I have just stated, before I came on the bench, the clerk, Mr. Parker, brought these motions into my chambers and I have read in each instance—I only mention this one motion now because that is what we are talking about. I have read the memorandum of counsel attached to the motion. Irrespective of what is stated in the memorandum and with all due respect to counsel, however, in that sense, that respect, the Court finds that the motion is not well taken and that it should be and it is overruled.

I would like to have the government now prepare an order overruling this motion, or in keeping with the ruling of the Court just made. My purpose of that is, it will appear in this transcript that the motion, of course, is overruled, but I think it should now, since it has been filed, and properly so, I would like to have the clerk's office show the order overruling it, so it shows affirmatively on our appearance docket that the motion has been disposed of, just like we did with the other motions the other day, which I hope we get an order on perhaps yet today.

Now, that disposes of that motion. Now, did you wish to call attention to some of these other motions, Mr. Canny?

Mr. Canny: No. We have filed them and as suggested, we have argued them.

The Court: All right. Then I have here before me now, filed today, June 2, 1952, a motion entitled "Motion of Defendant William J. Opper for an order requiring the government to elect as between the several counts of the indictment." Then the motion sets forth in paragraphs A and B the counts which it thinks the government should be required to elect as between.

The Court is of the opinion and so finds that this motion is not well taken and that it should be, and it is,

overruled. Counsel for the government will prepare an order in accordance herewith. Submit those orders, in the first instance, always to counsel for defendant Opper and then after they have either seen them and have marked "Seen" on them, or whatever it is, indicate they have seen it, then let them be submitted to the Court.

The next motion before me is a motion filed today, June 2, 1952, on behalf of Defendant William J. Opper, which reads in the caption, as follows: "Motion for dismissal of each count of the indictment as to Defendant William J. Opper and motion in the alternative for a judgment of acquittal on each count of the indictment as to the defendant William J. Opper." Now, with this motion there is attached a memorandum in support of the motion by counsel for defendant Opper. I have gone through this memorandum because it was submitted to me along with the motions before I came on the bench, by the clerk, Mr. Parker.

Now, in this motion defendant Opper states: "Now comes the defendant William J. Opper at the close of all the evidence and moves the Court to dismiss counts" and so forth. This substantially, I mean by that, in the broad sense, is a repetition of a motion that was filed at the close of the government's case, but in order to keep their record straight it was incumbent upon the defendants for them to do just what they are doing, that is, to renew the motion at the close of all the evidence.

Now, the motion was heard before and as the record shows it was argued quite extensively and briefed quite extensively. At that time, the Court overruled the motion and I still hold here now that this motion filed today at the close of all the evidence, wherein the defendant William J. Opper moves for the dismissal of each count of the indictment and in the alternative for judgment of acquittal upon each count, that motion is not well taken and that it should be in both respects and in its entirety overruled, and counsel for the government will prepare an appropriate order in keeping with that ruling.

Now I have before me here next a motion on behalf of

defendant Robert George Hollifield, Sr. That motion was filed today, June 2, 1952. It is entitled "Motion of defendant Robert George Hollifield, Sr. for an order requiring the government to elect as between certain counts of the indictment." It is after the same pattern as the motion filed on behalf of the defendant Opper. No memorandum was filed with it but any memorandum or statement that was filed on behalf of the defendant Opper would be appropriate, of course, to be considered on behalf of the defendant Hollifield, although on that motion there was no memorandum filed on behalf of the defendant Opper. However, the Court is of the opinion and so finds that this motion on behalf of the defendant Hollifield is not well taken and that it should be, and it is, overruled. Counsel for the government will prepare an order in accordance with the ruling.

Now I have before me the last of these motions, as far as I know. This was filed today, June 2, 1952, and the motion in the caption reads as follows: "Motion for dismissal of each count of the indictment as to defendant Robert George Hollifield, Sr., or motion in the alternative for judgment of acquittal on each count of the indictment as to the defendant Robert George Hollifield." This motion is filed by the defendant Hollifield at the close of all the evidence and together with the motion there is a memorandum which I have read, which I have already stated, and which I understand follows along the same line and is of the same pattern as the motion of similar nature filed at the close of the government's case, which motion, at the time, I overruled.

The Court is of the opinion and so finds that these motions filed today, June 2, 1952, at the close of all the evidence, on behalf of the defendant Robert George Hollifield, to dismiss each count of the indictment, or in the alternative to enter a judgment of acquittal, is not well taken in either respect, and that it should be, and it is, in either and both respects overruled. The government will please prepare an order in accordance with the ruling.

Now, Gentlemen, just as a matter of interest, without any argument at all, but I think it would not do any harm to put in this record and to call the attention of counsel to a decision which was handed down by the Court of Appeals of this Circuit, on May 29th. It is dated "Tuesday, May 29, 1952," which was Thursday of last week. I have in my hand here the advance printed copy. It is in the case of Ross et al. v. United States. It is interesting so far as our present case is concerned, that is, it is to the Court at least, because it deals with, and, in my opinion, settles authoritatively, so far as the instant case is concerned, the question of severance. This Court of Appeals decided that question in that case, which counsel can read. It deals also with the fact that on these motions the Court of Appeals say this: "That in Pockey v. U. S., 96 Fed. (2) 9, C. C. A. 6, we held that in consideration of the rule that on a motion for directed verdict the evidence must be considered in the light most favorable to the party against whom the motion is urged. No quantity of contradictory evidence would authorize a trial court to direct a verdict if there is sufficient substantial evidence to take the case to the jury." And then you will find also what the court has held in regard to this matter of leaving in evidence here the statements made by the defendants, respectively, that is the two statements by Mr. Hollifield and the statement by Mr. Opper.

I have already told the jury what to my mind is very much more forceful language than the district judge's in these cases where that same principle is involved, they must not consider, of course, these statements, except as against the defendant who made them.

You will find, I think, that is quite interesting and throws some light, at least I think so, on the case now pending before us. It has just been decided in the last two or three days as you can see. It was decided on the 29th of May 1952. I say, I call counsel's attention to it as being something interesting, that they might like to read, during the summer vacation, if they care to do so. There is no law requiring you to read it.

Mr. Aug: Your Honor might be interested in knowing that Mr. Richter prepared the brief for the government in that case and your Honor, is very happy at this stage of the game, at being sustained on his point, which he raised in his brief, and the Court has substantially used his reasoning in handing down the decision in that case on that point.

The Court: I presume that Mr. Richter is using the same line of reasoning here. I don't know. Be that as it may, here is a decision for what it is worth. Of course, this is one of those old siding cases, the first one we tried in this court, you may recall, years ago. The defendants were convicted in that case. This Court, by some chance, happened to be affirmed. Now, the district court is affirmed in this other case. You are not bound to read that but I think you might be interested, as I say, in looking over these matters this morning. Very well.

Now I will give these motions back to you, Mr. Parker. They belong in the clerk's office.

See that these orders are prepared, Gentlemen, and give them to counsel for defendants, so if they have any comment to make, they may do so, so in their ultimate form, whatever it may be, we can get them on while counsel is here from out of town and the case is in progress and we don't have to wait and pick up some loose ends later on.

That brings us, as I understand it, to the question of submission of any special charges, if such there be.

Mr. Richter: If the Court please, we do have a number of special charges. Now does the Court wish to handle those. Counsel have been given copies.

The Court: Do you have a copy?

Mr. Richter: We have a copy, yes.

The Court: All right. I would think we would take them up in the order in which you have given them to us. I don't know that the order means anything, so far as the

sequence is concerned. It is simply to give them something that we can refer to.

Let's take up Government's requested instruction No. 1. What I am interested in, Gentlemen, is this: First, whether or not as to any of these instructions asked by the government there is an objection on the part of the defendants, and if so, you may state, if you please, what your objection is. And the same thing would be true, if the defendants have any to offer, whether there is any objection on the part of the government, and if so, why your objection.

If there is no objection to them on either side, then I will take them and the probabilities are, I will very likely, if they meet with my view of the law, give them, although I am not going to be bound by them, because if I have a different view of the law, of course, I cannot instruct the jury as to what counsel agree as to what the law is. I will have to take that responsibility myself. However, if there is no objection, then I can approach it from that angle, whereas I would have to approach it from a different angle if there is objection.

Mr. Canny: If your Honor please, these eight proposed instructions have just been handed to us and we have had no opportunity to confer. We would like to have about fifteen minutes, if it is satisfactory to your Honor for us to confer about them.

The Court: Yes, you may. Would you be kind enough to give copies of your instructions—

Mr. Canny: They already have been furnished with copies.

The Court: —to the government and then during this interim the government can also confer and see whether they have any objection.

I think we better do this, Mr. Canny: I don't think the number means anything. Would you please number them just for the purposes here, that is all? (After Mr. Canny does as suggested by the Court:) Has the government got those numbers?

Mr. Aug: Yes, your Honor.

The Court: Now then I have been handed here two special charges on behalf of the defendants. One is No. 1 and is on behalf of the defendant William J. Opper. The other is No. 2 and is on behalf of the defendant William J. Opper. Then there are two other charges, I don't know whether they are exactly alike or not, on behalf of the defendant Hollifield, No. 1 and No. 2. Do you Gentlemen for the government have those numbered?

Mr. Richter: Yes.

The Court: So when we come back we will know what we are talking about; use the numbers and we won't get confused in our record. Very well. I will take a little recess to give counsel an opportunity to confer. As soon as you have reached a conclusion, Gentlemen, you let me know. I will wait until I hear from you. I would like to have the matter submitted as expeditiously as you can, for this reason, because I can't finish my charge until I see what changes, if any, may be needed.

Thereupon a short recess was had.

The Court: Now, Gentlemen, let's take up the Government's requests, starting with No. 1, what we have numbered 1, and take them up in order, if that is all right.

Mr. Canny: Defendant Opper objects to Government's request No. 1. We think the statute speaks for itself and should be read instead of simplifying or refining the statute itself. It doesn't cover Opper's claimed participation as an aider and abettor.

The Court: That is Government's Request No. 1. Does the Government wish to be heard as to their Instruction No. 1, to which they are now objecting?

Mr. Richter: If the Court please, those are not submitted as complete charges in any respect. They are offered merely as suggestions to the Court. It is true this does not cover the defendant Opper's claimed offense as

aider and abettor. If counsel object to that, we will be glad to accommodate counsel and prepare one to conform to the Opper situation.

Mr. Canny: There was a further objection preceding that objection and that was the statute speaks for itself and should not be revised or limited or added to.

Mr. Richter: If the Court please, in answer to that we say this, that all through the cross-examination of the government's witnesses, in the opening statement made by counsel for defendants, these matters were referred to as matters of defense. The fact that the services rendered were routine and in the ordinary course of business and involved sound judgment and so on. Now we believe it will greatly clarify the situation, from the standpoint of the jury, if they are told that those things do not constitute a valid defense to the indictment.

The Court: Well, now, Gentlemen, I understand the government does not insist on this Instruction No. 1. But I will charge the jury, so counsel will understand on both sides, something to this effect: It may not be in these exact words. I will read to the jury first Section 281 of the United States Code. I will also read to the jury Section 2 of the United States Code, which has to do with aider and abettor. I will also read to the jury in due season Section 371, which has to do with the question of conspiracy, and I will charge the jury in addition to that something to this effect: "The crime specified in Section 281 U. S. Code consists in the receipt or agreement to receive compensation for services rendered or to be rendered in relation to any proceeding, contract, claim, controversy, or other matter in which the United States is a party, or directly or indirectly interested, regardless of what those services were." Now, of course, that will be preceded in the charge by the fact that a man must be an employee of the government of the United States and this other language that is used in the statute, that is, "Whoever being an officer or employee of the United States" and so forth. That will, of course, precede this

but that, in general, I will put in my charge, but not in the form that is submitted here in Instruction No. 1, which I now understand to be more in the nature of a suggestion to the Court than a request for a special charge.

Now what about Request No. 2?

Mr. Canny: Objection upon the same basis, your Honor, and for the further reason that this requested instruction, like all the others is not complete; it doesn't go far enough and it epitomizes or concentrates on one particular phase of the evidence.

The Court: Well, I will not give Instruction No. 2, so-called, in its form as presented here, but I will instruct the jury something to this effect: I mean in my general charge now. "If you find, as a matter of fact, that the services rendered and to be rendered by the defendant Hollifield in this case may have been ordinary routine services which he would or might have rendered regardless of receipt by him of any compensation, such fact is not a valid defense to the indictment in this case as to any of its counts." Now, the basis for that lays in the fact that Mr. Hollifield, in his own statement, Exhibits 37 and 38, says he was just performing routine services.

Really the issue in this case, Gentlemen, is so simple that it hardly seems it is possible to have taken as much time as we have in trying to confuse it. I don't mean trying to confuse it wrongfully. I don't mean to charge that. I don't want it to appear in the record. But the effect is, to my mind, to confuse something that is a very simple thing: Is Hollifield an officer of the United States or employee of the United States? Did he agree to receive compensation for services rendered or to be rendered? Did he receive it in some matter in which the United States was directly or indirectly interested? That is the lawsuit. If he did, he is guilty. If he didn't, he is not. That is all there is to this case.

Now, did the defendant Opper aid and abet him or induce him, Hollifield, to do any of those things? If he did, he is guilty. If he didn't, he is not guilty.

Now, that is all the issue there is in this case, in my opinion. I don't see how it could be anything else. It don't make any difference whether Mr. Hollifield's duties were routine. It don't make any difference whether these were the best goggles the world has ever seen or ever will see. That is not a defense in this case; that hasn't anything to do with the case. Of course, it is all right to argue, but as a matter of law, in my opinion, I don't think it has a thing to do with the case at all, if they produced out there and put in these packages, these kits, so-called, the finest goggles that were ever in the world made or ever will be made. That is not the answer to section 281 at all. The fact it was routine service, that doesn't made any difference. Mr. Hollifield can't sit out there at that Field and keep taking in money from all kinds of merchants and dealers, assuming that he did. I don't know that he did. But if he had that notion in his mind, in addition to compensation, he received from the government, he was very very much mistaken. He can't do that; that is a violation of the law. I don't care whether it is just routine service or what it is, he had no right, as an employee, in anything where the government is interested, in my opinion, to do the thing that is forbidden by that section.

I think the jury should be told. I don't mean in the crude way I have said it here, because, of course, I am not the trier of the facts. The jury may find he didn't do any of these things at all. But I don't think the jury should be misled with the idea that it is perfectly valid, as long as the man only did routine service anyhow, what difference does it make? They may find that in their verdict. I don't know. That is up to them. I can't control that. But as a matter of law, I don't think it makes a particle of difference in this case. That is what the offense is that is charged by Section 281.

I will give that in that sense. That is, in the sense I read it. This long speech I made here, that is just on the side to counsel. Mr. Richter says that is not a special charge, just for information.

Mr. Richter: That is right.

The Court: Instruction No. 3.

Mr. Canny: We object on the general grounds heretofore given, that it is incomplete and assumes that Hollifield made the decision to recommend contract deviations, which fact is in the province of the jury. A great many of these charges are subject to the same objection. We are objecting to all of them and I don't believe that these are merely directions to the Court.

The Court: Do I understand that the defendants would object to all of the instructions for all the reasons you have already stated, and if it comes to any particular one you have some specific and additional objection to make, you will so state? Is that right?

Mr. Canny: Yes, your honor. I think Instruction No. 4, for instance, is additionally objectionable because it attempts to have an applicability to all counts and mostly those parts of the count applying to Opper.

In Instruction No. 7, the statute speaks for itself and the indictment speaks for itself, and we think it is improper to attempt to refine the statute in these charges.

The Court: Now, as to the defendant Hollifield.

Mr. Meyring: We would like to have the record show, your Honor, that all the objections made by Mr. Canny on behalf of Mr. Opper will also apply to Mr. Hollifield, just as though restated to your Honor.

The Court: Yes. I understand that is as to all these so-called requested instructions submitted by the government, and that if there is anything in addition to what has already been said that you wish to call attention to specifically, you may do that.

Mr. Meyring: That is correct. We will use the same objections Mr. Canny has stated.

The Court: Now, Gentlemen, I will give Instruction No. 3, but not in the language which was handed to me by the

government. I will give it in this general language in my charge: "If you find as a matter of fact that the defendant Hollifield did receive compensation for his services, then the fact, if you find it to be a fact, that any decision by defendant Hollifield regarding the goggles referred to in the contract in evidence in this case, was made on the merits of the goggles themselves is not a valid defense to the indictment in this case as to any of the counts."

Now, I will give Instruction No. 4 with a minor change, in a general way, as follows: "If you find as a fact that the defendant Hollifield did receive compensation for his services from the defendant Opper, then the fact that the goggles supplied by the defendant Opper were of good quality and or that the government saved money by any contract deviations authorized by defendant Hollifield is not a valid defense to the indictment as to any of the counts thereof."

I will give Instruction No. 5 in substantially the language as it was handed to the Court: "If you find as a matter of fact that the defendant Hollifield did receive compensation for his services from the defendant Opper, then the fact that there was great urgency in the matter of supplying the land survival kits to the government is not a valid defense to the indictment as to any of the counts thereof."

I will give Instruction No. 6 requested by the government in substantially this language: "If you find as a matter of fact that the defendant Hollifield did receive compensation for his services from the defendant Opper, then the fact that the government did not suffer a financial loss is not a valid defense to the indictment as to any of the counts thereof."

I will give Instruction No. 7, however not in the language as submitted, but in substantially the following language: "The fraud against the United States under Section 371 of Title 18"—Now you will notice I left out Section 281 and the word "and." I will not say anything about the fraud claimed in Section 281 because I don't think that Section 281 says anything about fraud. I

think it a man receives compensation, he receives it. If he does it for his services and so forth as in that statute set forth, he is guilty of the offense. That is my opinion for whatever it may be worth. So I am going to leave that out. But in the other section, that is, the conspiracy section, that is another matter. That says, "If two or more persons conspire either to commit an offense against the United States or to defraud the United States" and so forth. I would say "Fraud against the United States in Section 371 of Title 18, the conspiracy section, the violation of which is charged in Count 5 of the indictment consists in the deprivation by the defendants Opper and Hollifield of the right of the government to the free and untrammeled exercise of judgment and action by the defendant Hollifield for the benefit of the United States in carrying on its official duties by defendant Hollifield."

I will not give what is requested in Instruction No. 8. Instruction No. 8 as it is handed to the Court reads as follows: "The receipt of money by the defendant Hollifield from the defendant Opper and the performance of services by the defendant Hollifield for the defendant Opper together with the attendant circumstances constitutes evidence of an agreement to receive compensation for services rendered or to be rendered by the defendant Hollifield to the defendant Opper." That I will not give in that form. I do not think it is proper for the Court to tell the jury about what constitutes evidence of this or of that. Those are matters that the jury will have to make up their minds about after they have heard the arguments of counsel. So, I will not give that instruction in that or anything like that.

That is all the instructions asked for by the government.

Now there are two instructions here numbered 1 and 2, respectively. They are exactly alike. I mean in this way: There is a No. 1 for the defendant William J. Opper. There is a No. 1 for the defendant Hollifield. Now each of those numbers, each of those instructions read exactly alike and so far as I can see are verbatim. I don't know

whether the government has any objection to Request No. 1 or not.

Mr. Richter: No, we have no objection.

The Court: I was going to give it anyhow, because it is the law. That was already in the charge before counsel called my attention to it in its charge, but nevertheless that will be given by the Court. Defendants' Request 1 I will mark "Given." I will give that to Miss Fischer and here is No. 1, the same thing by Mr. Opper. I will give those verbatim, exactly in the language counsel has requested.

Has the Government any objection to Defendant's Request No. 2?

Mr. Richter: Yes, we do object to Defendants' Requested Charge No. 2. It is the feeling of the government that if the statement contained here, taken from the language of Shepherd v. U. S., is applicable, that then the case should not have been submitted to the jury. In other words, if the evidence is as consistent with innocence as it is with guilt and the jury has nothing upon which to determine the guilt or innocence, then the case should not have gone to the jury. Now, on the other hand, if there is substantial evidence inconsistent with innocence in the case, necessitating its being submitted to the jury, then the language which is quoted here from the Shepherd case is not applicable to this situation.

The Court: I don't quite understand your first point. What do you say if the Court should instruct the jury that if the jury can reconcile evidence on any reasonable hypothesis consistent with innocence the case should not have gone to the jury?

Mr. Richter: What I mean is, where that is the case, then there isn't anything for the jury to consider, as I see it.

The Court: The first statement was that you did not think it should go to the jury. If the Court was of the

opinion that taking all the evidence in this case, it was the view of the Court that it could be reconciled with the theory of innocence as well as guilt, why then I think the Court should have taken it from the jury. But the Court is not taking that position. The Court is saying to the jury: "If you, Members of the Jury, weighing all the evidence in the case, if you conclude when you consider all the evidence in the case that it is consistent with the hypothesis of innocence as it is with that of guilt, why then you should find the defendants not guilty." I don't think that has anything to do myself with taking the case to the jury. It seems to me that is a wholly different matter.

Mr. Richter: I note that the Court used the word "all" and I had marked in here after the word "reconciled" the word "all." It may be that if the word "all" is inserted in there, the situation would be made clearer to the jury.

The Court: "If you can reconcile"—

Mr. Richter: The Court used the word "all," but counsel for the defendants have not put the word "all" in there.

The Court: "If you can reconcile from a consideration of all the evidence"—How have you got it?

Mr. Richter: "If you can reconcile the evidence"—

Mr. Canny: "Before you."

Mr. Richter: When the Court discussed this matter, the Court used the word "all."

The Court: Where have you got it inserted?

Mr. Richter: After the word "reconciled." I think perhaps that would clarify it. Counsel for the defendants haven't got the word "all" in there. I think if the Court is going to approve the charge, the word "all" should be in there, "reconcile all of the evidence."

Mr. Canny: I don't think that would be proper. I think "from the evidence before you," that stipulates and states what the evidence is and where it is.

The Court: I will put the word "all" in there. In other words, the jury must consider this "from all the evidence in the case."

Mr. Richter: May I say something to the Court? This is the thought that I have there. Suppose that the jury could look at the evidence, a certain portion of it, and say, "That is inconsistent with innocence," and then they look at another portion of the evidence and they say "That is consistent with innocence." My objection to the charge is that they emphasize the consistency with innocence. Now, possibly the inclusion of the word "all" there would eliminate that, but I still think it emphasizes the consistency with innocence when there may at the same time be in the case elements of evidence which are inconsistent with innocence.

The Court: How about this, Mr. Richter: "If on a consideration of all the evidence in the case you can reconcile it on any reasonable hypothesis consistent with the innocence of the defendants or either of them you should do so?"

Mr. Richter: Well, I think so. Of course, we have this situation in which all of the evidence may not be applicable to each of the defendants.

The Court: Of course, I will charge the jury, Gentlemen, that they can find a verdict in this case on circumstantial evidence. But in that connection I will charge the jury that the government must prove beyond a reasonable doubt every necessary circumstance. I shall also charge the jury that if all the circumstances taken together may be reconciled with the theory of innocence as well as with the theory of guilt, they should reconcile it with the theory of innocence. To my mind, I don't think there is any question about that being the law. That is in

my charge already. Perhaps that is sufficient to cover this without going into anything more. There is no doubt about this, the first sentence, of course, I will charge: "I instruct you that the law presumes the defendants charged with the crime innocent until proven guilty beyond a reasonable doubt." That I will charge and there is no argument about that.

I think, Gentlemen, I will just charge this question about reconciling it with either guilt or innocence, but if they can reconcile it with the theory of innocence—I think I will charge that as I already have it in my charge when I come to the question of circumstantial evidence, which to all intents and purposes is exactly what is asked for here, except this has to do with all of the evidence in the case. There is no doubt about that. The only question in my mind about this—I don't mean to say this is not good law—The only question in my mind is, if I am going to charge that, if I don't charge the alternative, then the first thing you know we are into a situation where I don't think I said anything to amount to anything. "It is your duty to find the defendants guilty or not guilty." That is all there is to it. I think I will leave that out, the second sentence and as to that the defendants and each of them may have their exceptions. It has always been my view that counsel are entitled to have a charge given in the language that they submit it, not some modified language of the Court. They are entitled to have it in the language they ask for and so, Miss Fischer, I will mark the first paragraph of this No. 2 as to each of the defendants "given" and as to the second paragraph that reads as stated in the record "refused." That is as to Mr. Hollifield.

Mr. Canny: Now, if your Honor please, in view of the requests of the government for special charges and in view of your Honor's statements as to what parts of those charges will be incorporated in your general charge, we have hastily prepared two other requests. I only have a copy, which after reading to you, I will send up to you.

"You are hereby instructed that if you find from all the evidence in the case that the services, which it is claimed were performed by Hollifield for Opper, were routine and in the best interests of the government and at a saving to the government, you may consider these facts, or any of them, in determining whether an unlawful agreement to receive and pay money for services was actually made."

The Court: Does the government object to that?

Mr. Richter: If the Court please, I believe that might be open to the same objection as No. 8.

The Court: Do you object to it?

Mr. Richter: Yes, if your Honor please.

The Court: I will sustain the objection.

Mr. Canny: Now, No. 4 is similar to No. 3. "You are hereby instructed that if you find from all the evidence in the case that the services, which it is claimed were performed by Hollifield for Opper, were routine and in the best interests of the government and at a saving to the government, you may consider these facts, or any of them, in determining whether an unlawful payment and receipt of money was made for Hollifield's services."

Mr. Richter: Same objection, if the Court please.

The Court: Sustain the objection. I will mark them "refused" and give them to Miss Fischer.

Mr. Canny: Mr. Hollifield's attorney will have to prepare them. We just wrote them out hastily in the recess period.

The Court: There are only two. We will also consider those for Mr. Hollifield as well as the defendant Opper, as if rewritten in the name of Mr. Hollifield.

Now, Gentlemen, if there is nothing further, I will endeavor to try to have my charge all ready so I can enjoy

the festivities tomorrow while you are arguing the case on both sides.

If there is nothing further, we will adjourn court until tomorrow morning at 11 o'clock.

Thereupon the further proceedings in the trial of this cause were adjourned until the following morning at 11 o'clock.

Morning Session.

Tuesday, June 3, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

Thereupon counsel upon both sides argued the case to the jury.

The Court: Members of the Jury, this closes the arguments in this case. The next step to be taken will be the charge of the Court as to the law governing this case, as I understand it to be. I will charge you tomorrow morning at 11 o'clock. In a moment or two we will recess the further hearing of this case until 11 o'clock tomorrow morning. I wish, however, that counsel would please remain just for a minute or two, after the jury is excused.

Now, Members of the Jury, I don't think it is necessary, I feel it is my duty to impress upon you the importance of bearing in mind the admonition that I have given you heretofore; do not discuss this case with anybody; don't let anyone talk to you about this case. If anybody attempts to talk to you about the case, report that fact to the Court immediately. Now even yet do not make up your minds, because you have yet to hear the law. After I have charged you the law, then the case will be turned over to you for your deliberation, your consideration and your verdict.

You may now be excused and return here, if you please, tomorrow morning at 11 o'clock.

Thereupon the jury retired from the court room and the following proceedings were had out of the presence and hearing of the jury:

The Court: Now, Gentlemen, I asked counsel to remain for two reasons. First, I asked counsel for the government to, in some way, mechanically or otherwise, see that the deletions in its exhibits 37 and 38 were in such shape as not to destroy the statements, but at the same time so that the jury could not observe what is stated in the parts that have been deleted. Have you done that, Mr. Aug?

Mr. Aug: Yes, your Honor. We conferred with Mr. Canny yesterday afternoon as to our method. It has been done and I think it meets with the approval of counsel on both sides.

The Court: Very well. Show them to counsel for defendants, if you please. Of course, the jury will be instructed not to look at them anyhow.

Mr. Aug: Your Honor, we have placed, to the satisfaction of counsel for defendants, deletions on the front side. They have raised the question as to being able to look through it and I think in fairness to all parties concerned, we will put another piece of paper on the back of it, then there can be no question about it.

The Court: Anyway, I would like to have counsel for defendants satisfied.

Mr. Aug: Yes, your Honor.

The Court: To the extent that they feel that there has been—those parts have been deleted, will not be looked at or read by the jury, as I have stated before, as they have not been by the Court. I haven't looked at them. I don't know a word that is in them. I don't want to know. They are not evidence in the case. It is none of my business, as I view it, a bit more than the jury's.

So, if you would do that, please, in such a way—Can't you do that before counsel all leave tonight, so we won't have to take up the time tomorrow morning?

Mr. Aug: Yes, your Honor.

The Court: Sort of mechanical arrangement, in some way to be satisfactory. If you Gentlemen are satisfied, of course, the Court is satisfied.

Now the next thing is this, Gentlemen: Mr. Canny, perhaps Mr. Meyring and Mr. Svoboda may know about this. I am sure government's counsel do, but I don't think you Gentlemen who live out of the city, that is you attorneys, have been familiar with this practice. I would like to explain it to you and see whether it meets with your approval.

Rule 30 provides that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Then the rule goes on to say, "Opportunity shall be given to make the objection out of the hearing of the jury."

Now, what I have done in other cases is this: I have instructed the jury to retire to the jury room but not to consider the case or their verdict, but retire for the sole purpose of electing a foreman. Then while they are out, we keep them out as long as necessary. We will not send any papers out or anything of that kind. I will give counsel then the opportunity in open court and in the record to, of course, state their grounds or objections, anything they wish to state in accordance with the rules.

Now, the only other alternative to that, that I know of, is either for counsel to come up to the bench or, perhaps, for all of us to retire to the judge's chambers. But I think it is better, perhaps, to do it in open court where everybody can have the freedom of the court room.

Now, of course, you understand the rule says, that you shall object before the jury retires to consider its verdict, and I distinctly say in all cases, I will in this case, that

they must not consider the case or their verdict and, of course, they probably will elect a foreman in a very short time. But we will keep them there until you get a full opportunity to say what you wish to say here.

I, personally, think that is better than to try to crowd around the bench, where everybody has to whisper and all that, or as I say excuse the jury, or let the jury sit here and we go back into the judge's chambers.

Now, if that procedure is not objectionable, why that is what I will do. If it is objectionable, of course, I won't follow it.

Mr. Kelley: That seems entirely agreeable, your Honor, to the defendant Opper.

Mr. Meyring: And to the defendant Hollifield also, your Honor.

The Court: Agreeable to the government?

Mr. Aug: Yes, your Honor.

The Court: Well, I have done that in all the cases. I have tried to comply with this portion of the rule that opportunity be given out of the hearing of the jury. But sometimes counsel like to argue something. I think you can do it better if you do it here in open court where we have the court reporter anyhow, and have the freedom of the court room, than if you tried to crowd around the bench up here.

So, if that is satisfactory, that is what we will do. Then when they come back to report that they have elected a foreman, then I will advise them they can retire to consider the case and so forth, and then we will turn over the exhibits and the indictments and whatever is necessary.

Well, then, I will leave it to you Gentlemen to work out this problem to see that these exhibits are deleted in such a way as that the jury cannot see them and at the same time not to spoil the statements themselves, because you

may have some use for them at some other time. I don't know.

Is there anything further counsel has to suggest?

Mr. Kelley: No, your Honor.

Mr. Aug: Nothing, your Honor.

The Court: Adjourn court until tomorrow morning at 11 o'clock.

Thereupon the further proceedings in the trial of this cause were adjourned until tomorrow morning at 11 o'clock.

The Court: We have the forms of verdict. One is: "We, the jury, herein do find the defendant William J. Opper guilty in manner and form as charged in the (blank) counts of the indictment and (blank) remaining counts."

And the other one is the same thing, except "not guilty" as to Hollifield and "not guilty" as to Opper.

I don't see, Gentlemen, as to how anything could be any clearer than that. It seems to me that simplifies it and I don't see how you could have anything any plainer. If counsel object to it, why, I would like to hear what you have to say.

Mr. Kelley: I sense a proper objection in the use of the printed form. I object to inserting the typewritten "not" in one place and not in another. I think it would lend to confusion to the prejudice of defendant.

The Court: Do you suggest we leave out the word "not" and let the jury write it in.

Mr. Kelley: I feel there should be two forms of typewritten verdict as to each defendant. One in typewriting "We the jury find the defendant John Doe guilty as to counts" and leave a place blank. The other "We the jury find the defendant John Doe not guilty as to the following counts."

The Court: You have to put the word in in typewriting.

Mr. Kelley: I may be wrong. I wouldn't want that verdict submitted in my case. I would rather have it typewritten.

The Court: You would use the printed form in either event. You have to put the word "not" in in either case. The only thing is you use separate verdicts as to Hollifield and separate verdicts as to Opper.

Mr. Kelley: Without any confusion as to the word "not," whether the word "not" is or is not there.

The Court: I don't think I understand that exactly.

Mr. Kelley: Well, my thought is that the better and fairer practice would be—let's take one defendant at the time. Take the defendant Opper. There should be two forms of typewritten verdict. One: "We, the jury, find the defendant Opper guilty as to counts" and then a blank line in the indictment, period. Another one: "We, the jury, find the defendant Opper not guilty" and a line followed by the word "indictment." It would mean no confusion could arise then.

The Court: I can't agree with you, Mr. Kelley, on the question of confusion. I think it is exactly what you are going to do is to confuse the matter rather than simplify it. However, I am going to follow what the defendant suggests. I will use the forms that you state. In my opinion it makes it more confusing than using the forms we do there. That is merely my opinion.

Mr. Kelley: I don't know that I speak for all defendants either.

Mr. Svoboda: It is a suggestion offered by Mr. Kelley. He is referring to the way the word "not" guilty is inserted there. He believes it would be better if they were all typewritten instead of on a printed form.

The Court: That is ridiculous. That I am not going to do, Gentlemen. We have used printed forms in this court for twenty-three years to my positive knowledge

and when I practiced law for at least twenty-five years before that, and I am not going to start in this case to change it because this has been done for at least fifty years in this court room here. Not this court room, that is not true. This court room hasn't been here for that long.

We will use the printed forms. Counsel may have their exception to it. I will use the form naming Mr. Opper on two and Mr. Hollifield on two, if you wish that. I think myself it adds to the confusion, but that is purely a matter of opinion. I respect the opinion of counsel and I will do what counsel say. I am not going to have defendants feel that there is any prejudice, as far as these papers are concerned, for goodness sake. It is only a question of a different verdict. So I will use these two forms, if that is what counsel wish.

Mr. Richter: Of course, the Court will tell the jury the significance of the papers when you instruct them.

The Court: I intend to tell the jury that there are two forms of verdict, which, of course, is what we have always used here, and then they can put in whatever they please. I thought it was very much simpler. If counsel do not agree with me, I would rather defer to the wishes of defendants' counsel. I don't want to have any question about the matter when the case is over, about some little technical matter about the verdicts. But the printed form I will use. That is settled right now. I am not going to change that.

Mr. Kelley: I can't understand why the printer left out the printed word "not." Usually you would think the printer would have had a "not" guilty.

The Court: I don't know. As I say, Mr. Kelley, I am not going to try to go into that part. I don't know. They have been used for years. However, I will use these two forms, one for Mr. Opper and one for Mr. Hollifield, if that is what counsel wish.

Mr. Kelley: Thank you, your Honor.

Mr. Svoboda: That is satisfactory.

The Court: All right. I will tell the jury there are two forms of verdict as to the defendant Opper and two forms of verdict as to the defendant Hollifield, one finding the defendant Opper guilty as he stands charged in the indictment, and they can put in the counts; the other finding him not guilty. The same way with the defendant Hollifield, the jury can read it when they get out there. It is very simple, although I still insist this is not as simple as the other would have been. But that I am not going to concern myself about now. I will do what counsel for the defendants wish in that respect. Those are the ones we will use, Gentlemen, so you will all understand. I will give them to Miss Boyd to hold until tomorrow.

This is all after court has adjourned, but let the facts appear just as they are, so there won't be any question about it. But it happened after court adjourned, because counsel are all here. It came as an aftermath. I thought we would save that much time tomorrow.

I don't have to adjourn court again, because we are already adjourned.

All right, Gentlemen, tomorrow morning at 11 o'clock.

Morning Session.

Wednesday, June 4, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded as follows:

The Court: Members of the Jury: It now becomes my duty to charge you as to the law governing this case. Before I proceed, however, with my regular charge, I want to pause for just a moment to express to you, and to each of you, my very high appreciation for the service you have rendered.

As jurors you are an arm of the court, and a very important arm. As I shall tell you in just a moment in my charge, in the province that you have to work and within your sphere you are just as independent in your thought and action as is the court. You have a very important part to take—jurors always do in every trial; and you are entitled to the thanks of the court for the time and attention that you have given throughout this case.

You, members of the Jury, are the sole judges of the facts, but you must take the law from the Court. The law as the Court gives it to you is binding upon you. It is not for you to determine what you think the law should be. It is for you to determine what the facts are and then to apply to those facts the law as the Court gives it to you. In doing this you must not be swayed either by sympathy or emotion, or by passion or prejudice. It is your duty to receive the charge of the Court as the law applicable to the case, and apply it to the facts as you find them to be. And this you should do with complete impartiality, without bias or prejudice upon the one hand or sympathy or favor upon the other. You are to consider the case dispassionately and decide it solely on the evidence under the law as I shall charge it to you.

At the outset I wish, too, to impress upon you the importance of your careful consideration of the case when it is finally submitted to you. Our jury system contemplates that a jury will be composed of fairminded citizens, chosen from various walks in life, and with varying experiences, having the necessary qualifications to give the case proper, unbiased, intelligent, conscientious consideration.

It is important that you also bear in mind that in a case such as this our system contemplates that the jury be composed of twelve citizens. Each juror, of course, is to make up his or her own mind and come to his or her own conclusion. This should not be done, however, because there is a majority siding one way or the other; it should not be done because of any reason other than upon a careful consideration of the evidence and the law as I shall give it to you. However, that does not mean that you should take an arbi-

trary position that your own recollection of the evidence is correct and that in their recollections all of your fellow jurors are in error. One reason for having twelve persons on a jury is that they may discuss and approach any proposition in connection with the evidence or the case in an open-minded way, and not in an arbitrary or unreasonable manner. One of the qualifications sought in selecting jurors is that they be persons who are mentally capable of being tolerant, tolerant of their own opinions and tolerant of the opinions of their fellow jurors. I merely caution you at the outset of this charge that, among yourselves, you should freely discuss, after this case has been submitted to you, the various points of evidence, and not take an arbitrary stand without giving consideration to the views of your fellows. However, as I have said, in the final analysis, each of you should make up your own mind and come to your own conclusion.

While the law contemplates the concurrence of twelve minds in a verdict in a criminal cause, it is, nevertheless, the duty of each juror to weigh for himself the evidence in the cause and thus for himself make up his own mind as to the guilt or innocence of the defendant or defendants on trial. On the other hand it is also the duty of each juror to consult freely, fairly and fully with his fellow-jurors on the facts at issue and the law involved in the case. No juror should, through indifference or weakness, yield his or her own honest conclusion and deliberate judgment on the question of the guilt or innocence of the defendants or either of them, nor should mere pride of personal opinion or other motive prevent him or her from consulting with his fellow jurors in an effort in good faith to reach a just verdict.

The plaintiff in this case, the Government of the United States, and the defendants on trial, respectively, stand in this court upon an equality, and each is entitled to the exercise and benefit of your sound and deliberate judgment, based solely and only upon the evidence as it has been adduced here in court and the law as contained in this charge.

If at any time in this charge I should give expression as to any views as to the evidence, that is, what the evidence has shown, or with respect to the credibility of the witnesses, you will understand I am expressing only my personal views, which are not in any way binding upon you in your deliberations. You, and you alone, are the judges of the evidence.

The Court does not, by anything contained in this charge, nor by anything which has occurred during this trial, intend to assume or intimate that any fact has been, or has not been proven. The question of proof as to all facts in this case is for you to determine from the evidence adduced in the cause.

In this connection, I wish further to instruct you that neither the indictment, the opening statements of counsel, nor the arguments of counsel are evidence in the case, and none of these should be considered by you as evidence in deciding the facts in the case. This applies also to remarks of the Court made during the progress of the trial. The indictment is a mere accusation or charge against the defendants and each of them and of itself is not any evidence of the guilt of the defendants or either of them. It raises no presumption of guilt against them, or either of them, and you should not permit yourself to be influenced to any extent against the defendants, or either of them, because of, or on account of, the indictment. You should not regard evidence which has been stricken out or which you have been instructed to disregard; and any evidence that has been limited in its purpose should be considered by you as bearing upon that purpose only.

The two defendants on trial are named in this indictment. The indictment contains five counts, numbered 1 to 5, inclusive. To each and all of the charges contained in these counts, the defendants respectively, have entered their plea of "not guilty."

You are not only the sole judges of the facts but you, Members of the Jury, are also the sole judges of the weight of the evidence and the credibility of the witnesses. You are to determine the extent to which each and every

witness is to be believed, and the importance and weight which is to be given to their testimony. In considering the testimony of a witness, and the weight which you should give to it, you should take into consideration his or her interest, if any, in the outcome of the case; his or her affiliation, if any, with any of the parties to the case, or his or her connection in any way with the case itself and any bias or prejudice which he or she might be expected to have as a result of such interest of affiliation; but such interest or affiliation is not at all conclusive in accepting his or her testimony. These are simply facts which should be considered in weighing it. You may also take into consideration the demeanor of the respective witnesses on the stand; whether or not the testimony of any witness, as a whole, is consistent or conflicting in some of its parts; whether or not there was anything in his or her manner of testifying that would indicate such prejudice or bias as might induce him or her to color or exaggerate his or her testimony in favor of or against any part in the case; the knowledge which the witness has of the facts about which he or she testified; the intelligence of the witness, and every other attendant fact or circumstance upon which you might reasonably base a conclusion as to the credibility of his or her testimony. You have not the right to reject arbitrarily and without reason any part of the testimony but, having given all the facts and circumstances touching their credibility due consideration, it is for you to say to what extent the testimony of each and every witness shall be believed.

The fact that the defendants failed to take the witness stand and that neither one testified in his own behalf does not create any presumption against either defendant, and I charge you, Members of the Jury, that you must not permit that fact to weigh in the slightest degree against either of the defendants, nor should this fact enter into your discussions or deliberations in any manner in this case.

You are not concerned with the matter of the penalty should the defendants or either of them, be found guilty.

That responsibility rests upon the Court. Your duty and your responsibility will have ended when you have said by your verdict whether or not the defendants or either of them is guilty of one or more of the offenses charged against him in the indictment.

The presumption is that the defendants and each of them is innocent of the charges made against him. Every man is presumed to be innocent until he is proven guilty beyond a reasonable doubt. In no case does the law require the defendant to prove himself innocent. As I have stated, no inference of guilt arises against the defendants or either of them because of the fact that they have been indicted by the Grand Jury, and they can be convicted, if convicted at all, only by the evidence introduced here at this trial.

In the case now before you the defendants are on trial in answer to charges contained in an indictment which was returned by the Grand Jurors duly impaneled and sworn in this court. The Court will later refer more specifically to the charges made in the indictment. At this time reference is made to it to call your atttention to the fact that the defendants and each of them has plead "Not Guilty" to the charges contained in the indictment. By this plea defendants and each of them has put in issue each and every essential averment of the indictment, and the burden of proof is upon the government of the United States to prove one or more of the offenses charged, and all the essential elements thereof, beyond a reasonable doubt before you would be warranted in finding the defendants or either of them guilty of any of the crimes charged. And in this connection, you may consider as a part of this charge the definitions set forth in Section 13442-3 of the General Code of Ohio, wherein it is provided as follows: "A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. But the effect of this presumption of innocence is only to place upon the state the burden of proving him guilty beyond

a reasonable doubt." "Reasonable doubt" is defined as follows: "It is not a mere possible doubt because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

To justify you in returning a verdict of guilty as to the defendants and either of them the evidence should be of such a character as to satisfy your judgment and conscience of the guilt of the accused to the exclusion of every other reasonable conclusion. If you can reconcile the evidence upon any reasonable hypothesis consistent with innocence, you should do so, and in that event your verdict as to the defendants or either of them, as the case may be, should be "Not Guilty".

Proof beyond a reasonable doubt does not however mean proof to a mathematical demonstration. It merely means that you should not convict the defendants or either of them unless from all of the evidence you believe him guilty of one or more of the offenses charged in the indictment, beyond a reasonable doubt.

The presumption of innocence remains with the defendants or either of them throughout the trial of the cause and it is your duty to weigh the evidence in the light of this presumption, and if, upon all the evidence in the cause so weighed and considered, you find that the evidence fails to prove the guilt of the defendants or either of them beyond a reasonable doubt, then the defendants, or either of them, as the case may be, cannot be convicted in this cause.

The rule of presumption of innocence is not intended however to shield or protect those who are actually guilty. It is a humane provision intended for the protection of the innocent. If the whole of the evidence, when carefully examined, weighed and compared, produces in your minds a settled conviction or belief of the guilt of the defendants

or either of them as charged in any or all of the counts of the indictment, such a conviction as you would be willing to act upon in the more important and weighty matters relating to your own affairs, then you would not have a reasonable doubt and you should find a verdict of guilty in accordance with that conviction and belief. If, on the other hand, the proof leaves your minds in such a state of doubt and uncertainty as to the guilt of the defendants or either of them, as to any or all of the counts in the indictment as would deter you from acting in important maters which concern yourselves, such a state of mental uncertainty would constitute a reasonable doubt. If you have such a doubt thus arising, as to the defendants, or either of them, as to any or all of the counts in the indictment, it becomes your duty to acquit the defendants, or either of them, as the case may be, as to any or all of said counts.

Conviction may be based upon circumstantial evidence but in order to convict the defendant of the charges against him, on circumstantial evidence, it is incumbent upon the government to prove each necessary circumstance beyond a reasonable doubt, and the consequences must flow naturally and logically from the circumstances thus established. Circumstances that may be reconciled with the theory of innocence as well as with the theory of guilt should be reconciled with that of innocence.

As the Court has heretofore stated, the burden of proof rests upon the government to prove the offenses charged, and each essential element thereof, beyond a reasonable doubt.

When we say, however, that the burden rests upon the government, we do not mean that the government must introduce any given number of witnesses or a greater mass of testimony in order to sustain this burden. What we do mean is that when you go to your jury room and consider all of the evidence in the case, giving it such weight as you alone feel it justly entitled to receive, you must be convinced in your own minds beyond a reasonable doubt of the guilt of the defendants, or either of them before you would be justified in returning a verdict of guilty, as to both defendants or either of them.

The burden being upon the government to show beyond a reasonable doubt the truth of each of the essential elements of this indictment, it becomes necessary for the Court to define to you what the essential elements in this indictment are.

First, however, let me direct your attention to the indictment itself. The indictment will go with you to the jury room. There you will be at liberty to make such examination and study of it as you deem necessary and proper. I will not, therefore, read it to you verbatim or in detail.

The indictment contains 5 counts. Each count of the indictment charges and comprises a separate and distinct offense. The indictment itself may be roughly divided into two general branches or divisions, with the second division composed of what may be designated as subdivisions A and B. The first general branch or division of the indictment, we may say comprises counts 1 to 4, inclusive, wherein the defendants and each of them are charged with the violation of Section 281, Title 18, of the United States Code. That section insofar as here pertinent, reads as follows: "Whoever being an officer or employee of the United States or any department or agency thereof directly or indirectly receives or agrees to receive any compensation for any services rendered or to be rendered either by himself or another in relation to any proceeding, contract, claim, controversy or other matter in which the United States is a party or directly or indirectly interested is guilty of an offense and shall be punished" in accordance with the law as provided by that section.

The crime specified in Section 281, U. S. Code, consists in the receipt, or agreement to receive, compensation from any source whatsoever other than that paid by the government itself, for services rendered or to be rendered by an employee of the United States, in relation to any proceeding, contract, claim, controversy, or other matter in which the United States is a party or directly or indirectly interested, regardless of what those services are or were.

Upon an examination of the indictment, you will find that in count 1 thereof, it is charged that on or about the

first day of October, 1950, defendant Hollifield was "then an employee of the United States, to-wit, a designer and Chief of the Land Survival Unit, Medical Specialties Branch, Aero Medical Laboratory, Wright Air Development Center, United States Air Force, Wright-Patterson Air Force Base", and it is charged that while such an employee of the United States, defendant Hollifield "did directly agree to receive compensation from defendant Opper for services to be rendered by Hollifield in relation to certain purchase requests in which the United States was a party and was directly interested" and that at the same time and place defendant Hollifield "did directly agree to receive from Opper $1750 as compensation for rendition of services by Hollifield to Opper". The kind of services to be rendered; the purchase requests and the contracts referred to are all stated in count 1 of the indictment.

As you will observe in this count it is charged merely that defendant Hollifield "did agree to receive compensation". The statute, Sec. 281, Title 18, makes it an offense for one employed like defendant Hollifield to either "directly or indirectly" agree to receive any compensation under the circumstances enumerated in the statute. If such an "agreement" is made, it is a violation whether or not any compensation of any kind was ever given or received under such agreement.

In Count 2, you will find that it is alleged that on or about the first day of March, 1951, defendant Hollifield was then an employee of the United States in the same capacity as set forth in count 1, and that defendant Hollifield "did receive compensation directly from defendant Opper for services rendered and to be rendered by Hollifield in relation to certain contracts" in which the United States was a party and directly interested and which were then before the Air Force Department of the United States, and that at that time and place "Hollifield did receive directly from Opper $50" in currency of the United States as compensation for the rendition of the services as in count 2 set

forth, and all in connection with certain contracts which are described and set forth in count 2.

In count 3, you will find that it is alleged that on or about the first day of March, 1951, defendant Hollifield was at that time an employee of the United States, occupying the same position at Wright Air Development Center referred to in counts 1 and 2, and that at that time defendant Hollifield "did receive compensation directly from defendant Opper for services rendered and to be rendered by Hollifield in relation to certain contracts in which the United States was a party and directly interested, and which contracts were then before the department of the Air Force of the United States," and that at that time and place defendant Hollifield "did receive directly from defendant Opper approximately $250" in currency of the United States as compensation for the rendition of services by Hollifield for Opper, which alleged services and contracts with reference thereto are all set forth in count 2 of the indictment.

Count 4 of the indictment alleges that a short time prior to August 5, 1951, in the city of Dayton, Ohio, defendant Hollifield, then an employee of the United States, occupying the same position referred to in counts 1, 2 and 3, located at Wright Field "did receive compensation directly from defendant Opper for services rendered and to be rendered by Hollifield, in relation to certain contracts in which the United States was a party and was directly interested" which contracts were then before the Department of the Air Force of the United States, and that at the time and place referred to, Hollifield "did receive directly from Opper, approximately $200 in United States currency as compensation for the rendition of services by Hollifield for Opper" which services, together with the contracts with reference thereto are all set forth in count 4 of the indictment.

As to each of these 4 counts, respectiveiy, defendant Opper is charged as an aider and abettor; that is to say, he is charged with having violated Section 2 of Title 18, United States Code.

In count 1 you will find that it is charged that the defendant Opper "did aid, abet, counsel, induce and procure the defendant Hollifield unlawfully to agree to receive said compensation for said services to be rendered" as in count 1 set forth.

In count 2 it is charged that on or about the first of March, 1951, defendant Opper "did aid, abet, counsel, induce and procure defendant Hollifield unlawfully to receive said compensation for said services so rendered and to be rendered" as in count 2 set forth.

In count 3, it is charged that on or about the first of March, 1951, defendant Opper "did aid, abet, counsel, induce and procure defendant Hollifield unlawfully to receive said compensation for said services so rendered and to be rendered " as in count 3 set forth.

In count 4, you will find that it is charged that a short time prior to the fifth day of August, 1951, defendant Opper "did aid, abet, counsel, induce and procure defendant Hollifield unlawfully to receive said compensation for said services so rendered and to be rendered" as in count 4 set forth.

Section 2, Title 18, United States Code, insofar as here pertinent, provides as follows: "2. (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is a principal."

And so, if you find beyond a reasonable doubt that the defendants did violate Section 281, Title 18, United States Code, in the manner and form as in any one or all of the counts set forth and charged in the indictment, or if you find, beyond a reasonable doubt that the defendant Hollifield violated said Section 281, Title 18, United States Code, and that defendant Opper did, as charged against him, in any one or all of the counts 1 to 4, inclusive; that is to say, that he did "aid, abet, counsel, command, induce or procure" the commission of the violation of Section 281, Title 18, by the defendant Hollifield, and thereby procured the defendant Hollifield unlawfully to receive or agree to receive compensation for services rendered or to be ren-

dered in relation to any proceeding or contract in which the United States was a party or directly or indirectly interested as charged in the respective counts 1 to 4, inclusive, of the indictment, then defendant Opper became a principal in the violation of Section 281, Title 18, United States Code.

In this connection, I charge you, however, one cannot "aid and abet" in the commission of a crime unless there is another who commits the offense; that is to say, one cannot be an aider and abettor to himself.

In this connection I charge you that if you find as a matter of fact that the services rendered and to be rendered by the defendant Hollifield in this case may have been ordinary routine services, which he would or might have rendered regardless of the receipt by him of any compensation, such fact in and of itself is not a valid defense as to any of the counts of the indictment in this case.

I further charge you that if you find as a matter of fact that the defendant Hollifield did receive compensation for his services, then the fact, if you find it to be a fact, that any decision by defendant Hollifield regarding the goggles referred to in the contracts in evidence in this case was made on the merits of the goggles themselves, is not a valid defense as to any of the counts of the indictment.

I further charge you, Members of the Jury, that if you find as a matter of fact, that the defendant Hollifield did receive compensation for his services from the defendant Opper, then the fact that the goggles supplied by the defendant Opper were of good quality and/or that the government saved money by any contract deviations authorized by the defendant Hollifield, is not a valid defense as to any of the counts of this indictment.

I charge you further that if you find as a matter of fact, that the defendant Hollifield did receive compensation for his services from the defendant Opper, then the fact, if you find it to be a fact, that there was great urgency in the matter of supplying land survival kits to the government, is not a valid defense to the indictment as to any of the counts thereof.

And also that if you find as a matter of fact, that the defendant Hollifield did receive compensation for his services from the defendant Opper, then the fact that the government did not suffer a financial loss is not a valid defense as to any of the counts in this indictment.

This brings us then to what I have heretofore stated may be roughly called the Second Division of the indictment, which is the fifth count thereof. In the fifth count, the defendants, and each of them, are charged with having violated Section 371 of Title 18 of the United States Criminal Code. That section, insofar as here applicable, reads as follows: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each" shall be punished as provided by law.

This general division might well be divided into Subdivisions A and B. The fifth count charges the defendants, and each of them, with the crime or offense of conspiracy. Under the federal statute just referred to, conspiracy, as therein contemplated, is itself a substantive offense. That is, the offense charged in the fifth count of the indictment is a separate and distinct offense from that charged in any or all of the first four counts of the indictment. The conspiracy here charged, it is alleged in the fifth count of the indictment, was "to commit offenses against the United States and to defraud the United States by conspiring to violate Section 281, Title 18, United States Code, and to defraud the United States within the meaning of Section 371 of Title 18, United States Code, in that the defendants did conspire to cause Hollifield then and there an employee of the United States, to-wit, a designer and chief of the Land Survival Unit, Medical Specialties Branch, Aero Medical Laboratory, Wright Air Development Center, United States Air Force, Wright-Patterson Air Force Base, to directly receive from Opper compensation for services rendered and to be rendered by

Hollifield in relation to the contracts and purchase requests mentioned in the first four counts of this indictment, to each of which contracts and purchase requests the United States was, during the time above mentioned, a party and was directly interested, and which contracts and purchase requests were then pending before the Department of the Air Force of the United States, and that the defendants did further conspire that the services which Hollifield would render for the compensation paid him and to be paid him by Opper would consist in Hollifield recommending the approval and procurement by the Department of the Air Force of the United States of certain types of sun goggles and ski goggles, which goggles were in relation to the contracts and purchase requests above mentioned" and that the defendants did further conspire "to defraud the United States (a) of and concerning its right to have the lawful functions of the defendant Hollifield as an employee of the United States Air Force, performed free of unlawful impairment, obstruction, collusion, partiality, improper influence, bias, dishonesty and fraud, and (b) of and concerning its right to have Hollifield's duties performed untainted by the unlawful receipt by him of compensation from outside sources for services rendered in connection therewith."

Subdivision B, so-called, of count 5 of the indictment has to do with what is known as the overt acts. It is alleged in the indictment that "in the furtherance of this conspiracy, the defendants committed the following overt acts:"—Thereupon there are set forth in the indictment thirteen alleged overt acts. I shall refer later in more detail to the fifth count of the indictment and in that connection also to the alleged overt acts.

The fraud alleged against the United States under Section 371 of Title 18, the Conspiracy Section, the violation of which is charged in count 5 of the indictment, consists in the deprivation by the defendants Opper and Hollifield of the right of the government to the free and untrammeled exercise of judgment and action by the defendant Holli-

field for the benefit of the United States in carrying on his official duties by defendant Hollifield.

Now, Members of the Jury, there is no mention in Section 281 of Title 18 of the United States Code which the defendants and each of them are charged in counts 1 to 4, inclusive, in the indictment, with having violated; that is to say, the defendant Hollifield being charged with having violated Section 281, Title 18, and defendant Opper being charged with aiding and abetting Hollifield in such violations and thereby becoming a principal of the word "intent"; that is the intent which prompted defendant Hollifield in the alleged violation of Section 281 or of the defendant Opper in aiding or abetting the violation of that section by him. Nevertheless, I charge you, that if you find beyond a reasonable doubt, that the defendants, or either of them, did commit the alleged violations in the manner and form charged against them, or either of them, in counts 1 to 4, inclusive, in order to find the defendants or either of them guilty under any or all of said counts, you must also find beyond a reasonable doubt that the defendants or either of them, as the case may be, committed those acts or did those things; that is, committed the alleged violations with a criminal or unlawful or felonious intent.

Some acts are made criminal or unlawful without regard to intent, as for example, going through a red light at a street intersection, or a violation of the speed laws, or a parking ordinance, or sales of impure food or drugs or misbranded articles. But in most cases, as here, intent is a material fact to be proven.

It is stated as a fundamental rule that a person is presumed in law to intend the natural and probable consequences of his own voluntary act. Ordinarily, the intent with which a person commits an offense is not proclaimed by him. Here we delve into the examination of a mental state. Science has not yet reached the point where through it we can tell what is going on in a person's mind. The only say, therefore, we have of telling what an individual

knows or intends is by a consideration and observation of the facts and circumstances that surround his acts—by the doing or not doing of certain things in the light of common knowledge and experience.

Usually there is no direct evidence by which we may determine what an individual's intent was when a certain act was committed or statement made, and since we cannot look into the hidden processes of the mind of another, we must necessarily judge one's intent from his actions, conduct, statements and demeanor. You may, when an act is done, from the surrounding facts and circumstances, deduce or discover the intent with which it was performed. In no other way can motives of human conduct be fathomed, explained or exposed.

If common experience establishes that a man must know that the act which he is about to commit will necessarily produce a certain unlawful effect or result and he voluntarily and intentionally does the act, then there is established not only guilty intent, but there is also disclosed moral turpitude, utterly inconsistent with an innocent intent. On the other hand, guilty intent must not be presumed. Like every other material fact, it must be, as I have stated, proven beyond a reasonable doubt before the defendants or either of them can be found guilty on any of the counts against them in the indictment.

Now we come again to the fifth count of the indictment. Earlier I stated to you I would refer to it later more in detail. That count, as I have already said, charges the crime of conspiracy. The crime of conspiracy consists of the following essential elements, among others: There must be a combination of two or more persons; there must be an agreement, combination or confederation with a common design. Mere passive cognizance of the unlawful act or mere negative acquiescence is not sufficient, and there must be an intent to accomplish an unlawful act or to accomplish a lawful act in an unlawful manner.

If you find that the government has failed to prove any or all of these essentials beyond a reasonable doubt, then

you must return a verdict of not guilty upon count five contained in the indictment.

There are two elements to the offense of conspiracy, both of which must be proven beyond a reasonable doubt in order to convict: First, the conspiracy or unlawful agreement to commit the offense, and, second, the doing of some act in furtherance of that conspiracy. The latter is commonly spoken of as the overt act.

The conspiracy charged in the present indictment is a criminal conspiracy. Direct proof of the use of words by the defendants to constitute an agreement to violate the law in the manner charged is not necessary to show conspiracy. If by evidence of concerted action you are convinced beyond a reasonable doubt that the defendants were acting pursuant to a common understanding and agreement had among them to violate the law as charged, you would be warranted in finding that the conspiracy existed. Even an overt act itself may be considered in connection with the other evidence in the case in determining whether the defendants were acting pursuant to a common understanding.

A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. If, then, there is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, and some act is done to accomplish or effect that purpose, then the statute is violated.

If two or more persons form a conspiracy, enter into an agreement or come to an understanding and stop there, they do not commit a crime. There must be, in addition to this concerted action or agreement or understanding, some act committed in furtherance of the object of the conspiracy, which, as I have said, is sometimes called the overt act; and if they do form a conspiracy and any one of them does some act while in the conspiracy and in the furtherance of its object, then the crime is committed.

When parties enter into a conspiracy, each one becomes the agent of the other for the purposes of the conspiracy. Having joined in an unlawful scheme, having constituted an agent or agents, as the case may be, for its performance, each becomes liable for the acts done by the other in furtherance of the conspiracy until he withdraws therefrom and disavows further connection therewith.

Mere evidence that one of the defendants knew of the conspiracy and passively acquiesced in it would not warrant you in holding him guilty as a conspirator; nor would you be so warranted unless, by evidence or acts upon his part, you are convinced beyond a reasonable doubt that he agreed to participate and take part in the plot or conspiracy.

There must be at least two persons conspiring to form a conspiracy; one person alone cannot commit the offense of conspiracy. No person can conspire alone with himself or herself.

Conspiracies are seldom so formed as to be susceptible of direct proof, and therefore to establish the connection of a particular defendant with the conspiracy it is not necessary that there should have been any explicit agreement by him to form a conspiracy or join it; nor is it essential, or even possible many times, that direct proof should be made of his connection with it. It is sufficient if two or more persons in any manner or through any contrivance come, or tacitly come, to a mutual understanding to accomplish a common and unlawful design. Persons who form or enter into a conspiracy do not usually shout about it from the housetops or herald it by public announcement or proclamation.

The connection of a particular individual with a conspiracy therefore may be extracted and ordinarily is extracted from the circumstances connected with the transaction which forms the subject-matter of the accusation; that is to say, as I have already indicated, a conspiracy may be proved and usually is proved by circumstantial evidence, it being as competent to prove the connection of

an individual with a conspiracy by circumstantial as by direct evidence. But, as I have heretofore indicated, the circumstances must each be proven beyond a reasonable doubt, and the circumstances thus proven must be such as that when they are all considered together they cannot be reconciled by you with the theory of innocence but, on the contrary, they must satisfy your minds beyond a reasonable doubt that the defendants cooperated with the conspiracy.

When any unlawful end is to be effected and two or more persons actuated by the common purpose of accomplishing that end come together in any way in furtherance of the unlawful scheme any one of such persons becomes a member of the conspiracy, irrespective of whether or not the part he takes in it is important or subordinate, and irrespective of whether he performs his part in the presence of his coconspirator or at a distance remote from him or them, or at the place where he or they are performing their part of the conspiracy.

To constitute a conspiracy it is not essential that any member of it should have received any pecuniary benefit from it. Mere knowledge, acquiescence or approval of an act without a cooperation or agreement to cooperate is not enough to constitute one a party to a conspiracy. There must be intentional participation in the transaction with the view to the furtherance of the common purpose and design. To constitute one a conspirator, the evidence must show intentional participation in the conspiracy, in an attempt to violate the law, and if intentional participation is not shown, then such defendant cannot be convicted. If, however, the conspiracy should be established and the evidence shows that the defendants, in this case, had knowledge of it and that it was to violate the provision of the United States Code or carry forward the other charges contained in count 5 in the manner as set forth in the indictment, that they or he contributed thereto or participated intentionally, then such defendant becomes an active member in the conspiracy.

It is not essential to the existence of the conspiracy that each conspirator should have knowledge of all of the details of the conspiracy. Where the conspiracy includes a number of persons, it is often practically impossible that all should be advised of the details. It is sufficient to render a person liable as a conspirator if he has knowledge of the common design or purpose of the conspiracy and actively and intentionally assists in carrying that common purpose and design into execution by the common means agreed upon for so executing the conspiracy.

Unless you find that there has been shown beyond a reasonable doubt that there was a conspiracy as charged in the fifth count of the indictment, you need go no further so far as the fifth count of the indictment is concerned, because under such circumstances the defendants in this case could not be found guilty on the fifth count. If, however, you do find beyond a reasonable doubt that the conspiracy charged did exist, you will then proceed to consider whether either of the defendants did any of the overt acts charged in the indictment to give effect to the conspiracy.

This brings us to the second element to be proved, that is, the overt act. If conspirators do not act to carry out the object of a conspiracy, the offense is not complete and none of them can be convicted; but if one of the conspirators does an act charged in the indictment in furtherance of the object of the conspiracy, then the conspiracy is complete and all who are found to have been parties to the conspiracy may be convicted, because when the conspiracy itself is once established by evidence beyond a reasonable doubt, the acts of each of the conspirators to further the object of their plot are deemed to be the acts of all the conspirators. Therefore, it is not necessary, in order to convict, that it be shown that both of the defendants joined in the overt act or acts. All of those who join in a conspiracy are subject to punishment if any one of them commits an overt act in furtherance of it.

The overt act need of itself not be a crime. It must,

however, be an act intended to consummate the purpose of the conspiracy and must be one of the overt acts charged in the indictment. It is not necessary that the government prove all of the overt acts alleged; it is sufficient if the conspiracy and any one of the overt acts is proven beyond a reasonable doubt. It is not necessary that the consummation of the conspiracy be proven; that is, the crime is complete if the conspiracy be proven and an overt act be proven in the furtherance of the conspiracy, even though the object of the conspiracy was never in fact fully consummated or accomplished. Nor is it necessary under the fifth count in this indictment for the plaintiff to prove that the government sustained any financial loss as a result of the alleged conspiracy, if you find beyond a reasonable doubt that such conspiracy existed.

There are two kinds of conspiracies. There is a conspiracy to do a single thing. Two or more persons may enter into a conspiracy to rob a train; to do that one thing. After the train is robbed that is the end of the conspiracy, the object of the conspiracy has been accomplished. That is not the kind charged in this indictment. This indictment charges that this was a continuing conspiracy, that it began on or about October 1, 1950 and continued on up until on or about September 26, 1951, and that the objects of this conspiracy were of such a nature as that it continued over this period of time, with no definite time set for its full realization or full accomplishment. And so under this indictment, it is charged that the conspiracy was a continuing conspiracy, and it is necessary, Members of the Jury, that it be proven beyond a reasonable doubt that it was a continuing conspiracy.

Such a conspiracy as the one here charged, that is, a continuing conspiracy, may be abandoned by a conspirator and a person may thereby cease to be a conspirator, but in order to do so, he must take some definite, affirmative action with respect to his part in it. A person cannot abandon such a conspiracy by merely notifying his co-conspirator or co-conspirators of his intention so to do

or by merely ceasing to participate, as in the case of a conspiracy to do a single act. A conspiracy to do a single act may be abandoned before the act is committed, by a party thereto bringing home to his co-conspirator or co-conspirators the fact that he will have nothing further to do with the plan or conspiracy. In other words, to use the same illustration already used, if three persons agree to rob a train, and they enter into a conspiracy so to do, that is to commit that one act, and then before the train is robbed one of them repents and says, "I am not going to do this. I am not going to take any part in it. I am telling both of you two right now that I am out of it," and he walks off and leaves them and does not take part in the robbery, then such person has effectively abandoned that conspiracy and he would not be guilty of the offense of conspiracy.

But where there is a continuing conspiracy a party thereto cannot abandon it or cease to be a party to it by merely walking off, or moving away, or leaving the scene of operation, or by mere silence and lack of further participation in its objectives. He must do some positive act of disassociation from his fellow-conspirator and bring this knowledge home to him or them and, further than that, he must take reasonable steps, either directly or indirectly, or must know that reasonable steps have been taken, either directly or indirectly, to notify those who, by reason of his past association, might be expected to rely upon the fact that he is still connected with the enterprise.

The withdrawal from or abandonment of a continuing conspiracy, however, presupposes or is based upon the theory that there is such a conspiracy and that its existence has been proven beyond a reasonable doubt and that the person who seeks to withdraw from or abandon it realizes that he is or has been a member and a party to such a conspiracy, for a person, of course, cannot knowingly withdraw from or abandon something that never existed or from which he had no knowledge he was withdrawing.

I charge you, Members of the Jury, that if you find from all the evidence in this case that the defendants, or either of them, took any such action as effected an abandonment or withdrawal upon his part of any alleged conspiracy as charged in the indictment, such action as would be reasonably calculated to bring the fact of his withdrawal home to his co-defendant who is charged as a co-conspirator with him, then you should find the defendants and both of them not guilty under count 5 of the indictment.

I shall not, Members of the Jury, attempt any further review of the testimony. While in the Federal Court the Court is permitted to review and to make extended comment upon the evidence adduced at the trial, if deemed necessary, I feel that an attempt upon my part to do so at this time might be misleading unless I went into very great detail. I would not want you to feel or think that I have or am expressing any opinion with regard to the weight of the evidence, which is a matter solely within your province. This I might do even though unwittingly by some misplaced emphasis or by accidentially overlooking some important detail. The evidence has been summed up at great length by counsel who have reviewed it and explained it from their respective viewpoints in their arguments to you. It is, therefore, as fresh in your minds as it is in mine.

In this connection, however, I desire to call your attention to the following: There has been introduced in evidence through various witnesses, statements that were made on various occasions; some by the defendant Hollifield and some by the defendant Opper. There is in evidence the oral testimony of certain witnesses as to what these statements were. In addition to this oral testimony there are now in evidence three documents marked Government's Exhibits 37, 38 and 41.

Exhibits 37 and 38 are written statements, signed by the defendant Hollifield. Exhibit 41 is a written statement signed by the defendant Opper.

I have heretofore instructed you during the progress of the trial, as forcibly as I know how, but I repeat here that anything that defendant Hollifield may have said or written about himself in connection with the transactions here under consideration in the various counts of the indictment, you may consider as evidence against the defendant Hollifield, but you must not consider such statements as evidence against the defendant Opper.

On the other hand, whatever statements were made by defendant Opper, including the statements in Exhibit 41, being the written statement of defendant Opper, and signed by him, you may consider as evidence in the case as against the defendant Opper, but you must not consider any such statements by defendant Opper as any evidence against the defendant Hollifield.

You, of course, will give to these statements, both oral and written, such consideration as you deem they deserve with regard to the defendants repectively who made them and give to that testimony, as to all the other testimony in the case, such weight as you deem it properly deserves.

As I have heretofore charged you, you must not consider any remarks of the Court made to counsel during the progress of the trial nor any arguments of counsel that were from time to time addressed to the Court. It is your duty to decide the case entirely and solely upon the evidence as you have heard it and the law as I have given it to you. As I have earlier stated, you must lay aside all passion and prejudice. You are to consider all of the evidence in the case as adduced here in court, the probability or improbability of the stories of the witnesses, everything and anything in the exercise of your good common sense you may think proper to test the testimony that has been given in order that you may do what we all try to have done in all cases—arrive at the truth and a proper verdict render. This is the responsibility of jurors in every case and your responsibility and duty in this case.

Two forms of verdict. Members of the Jury, have been

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prepared by the clerk. These, of course, will go with you to the jury room. One of these provides wherein the jury do find the defendant Hollifield guilty in manner and form as charged in the respective counts against him in the indictment. If you use that form of verdict then you will put in here where it says, "manner and form charged in the (blank) counts"—you will put in whatever counts, if any, you find defendant Hollifield guilty of and the counts, if any, that you find him not guilty of. The other is a general verdict of not guilty wherein the jury finds that defendant Hollifield is not guilty in manner and form as charged in any of the counts of the indictment. That is the general form of not guilty. It is very much simpler when you see it in the jury room than it is for me to try to explain it. However, if you have any difficulty about it, you can advise the bailiff and he will advise the Court.

Now, exactly the same thing as to the defendant Opper; that is to say, there is a verdict, printed form, is guilty, the other, not guilty, as you can see, which is a general form of verdict for not guilty.

Now, Members of the Jury, when you retire to your jury room you will select a foreman. The foreman will sign the verdicts at which you have arrived on the forms that are given you, on the face thereof, where it says "Foreman" and the other eleven jurors will sign on the back. All twelve of you must agree in arriving at a verdict. It takes all twelve in every case in this court and, of course, in criminal cases.

Now, Members of the Jury, I am going to let you go over to the jury room. I do not want you to discuss the case. I do not want you to mention the case among yourselves. I do not want you to consider the case. All I want you to do when you go over to the jury room is to select a foreman, nothing else. When you have selected a foreman you, notify the Marshal or the Bailiff. There will be somebody on the door there in attendance at all times. When you have done that you notify him and then

I will have you come back here in the court room and we will take such further proceedings as are proper at that time. But now do not discuss the case. Just select a foreman, nothing else. Stop right there. To use a slang expression, "Just select a foreman, period."

Now, you alternate jurors, will you please just remain seated. Very fortunately we have all of our twelve jurors here in the regular panel and it did not become necessary, I am glad to say, to call upon you. I say, "I am glad to say." I mean I am glad we did not lose any of our jurors. So, if you will please remain seated and the twelve jurors in the box may now retire and select a foreman and notify the plaintiff and then I will have you come in.

Thereupon the jury retired from the court room and the following proceedings were out of the presence and hearing of the jury: And thereupon the two alternate jurors were excused.

The Court: Now, Gentlemen, in accordance with the rule counsel may state in the record any objections that they have. First, let me ask the government. Does the government wish to make any objections to anything or any comment, wish to have any modification of any kind? If so, please make your statement first before the defendants.

Mr. Richter: No comments.

Mr. Aug: We have none, your Honor. We are satisfied with the charge.

Mr. Canny: The only matter we wish to call to the attention of the Court is to renew our special charge of yesterday, the last one which we drew, in which we requested that the charge include an instruction that the jury could consider these questions whether or not the services were routine, whether or not they were in the best interests of the government, whether they were savings to the government, and so forth, could be considered by the

jury as to the reasonableness of the charge that there was an agreement to pay or a payment for such services.

Now, we are renewing that request now to have it included in your charge.

The Court: Certainly. That is quite all right. I passed on it the other day and I am not including it in the charge now and, of course, counsel may have their exception.

Is there anything further, Gentlemen?

You are familiar, of course, with the rule and it is not necessary for me to read it. If you say nothing further, I will have the jury come back in.

Now, what I propose to do, Gentlemen, if it is agreeable to counsel, I propose now to let the jurors, our regular jury, go to their lunch and then when they come back go to the jury room, not come into the court room, at say two o'clock. During that time I would like to have counsel together with Miss Fischer's assistance gather together whatever exhibits were admitted in evidence, together with the indictment and send them to the jury room, with the forms of verdict.

Then when the jury comes back I will tell them that from that time forward why, as far as I am concerned— If you wish me to, I will keep them together. I will not let them go home, if that becomes necessary. But I don't think we will go into that now. We will wait and see what they do and we can take that up later on, if it becomes necessary to do so.

Is that procedure satisfactory?

Mr. Kelley: Yes, it is.

Mr. Richter: Yes, your Honor.

The Court: Bring in the jury.

Thereupon the jury returns into the court room and the following proceedings were had in the presence and hearing of the jury:

The Court: Members of the Jury, have you selected a foreman? (The answer was in the affirmative.) If so, let the foreman please hold up his hand. (Juror No. 1 held up his hand.)

Now, Members of the Jury, I have talked to counsel and what I am about to say is agreeable to counsel, as well as to the Court. I am going to excuse you now and you be back not later than two o'clock. Of course, you are welcome to come back anytime you please, but be here by two o'clock. It is not quite one yet and when you come back just go right straight to the jury room do not come in here, please, because I am going to start the trial of another case in just a few minutes. You go right straight to the jury room and when—Mr. Foreman, when all twelve jurors are in there, then you notify the marshal or the bailiff. There will always be somebody at the jury room door. All you got to do is to rap and you tell the marshal or the bailiff you are all there and ready to proceed with your deliberation and your consideration of the case. Then in the meantime counsel will gather together all of the exhibits, the indictment and all the exhibits that have been admitted in evidence and they will be handed to you, together with the forms of verdict which I have referred to, by the deputy marshal in charge. They will have that ready for you when you come back at two o'clock and they will be handed to you and then you will go ahead and consider the case and when you have arrived at a verdict you just rap on the door and tell the bailiff or the marshal and he will notify the Court and we will notify counsel.

Now, Members of the Jury, of course, it is not necessary for me to impress upon you during this recess to be very, very careful to obey my instructions heretofore given you. This case is now—will be in just a few minutes—in your hands. You must not do anything or say anything that would create any kind of suspicion that would cause us any difficulty at this time. I know you appreciate that as well as I do and counsel do. So, bear in mind my ad-

monition. Return here any time you want to but please be back at two o'clock and go right straight to your jury room and then when you find you have all your jurors present, Mr. Foreman, you notify the bailiff and he will give you the papers and you are now excused until two o'clock this afternoon.

Thereupon the jury retired from the court room.

June 4, 1952, 4:50 P. M.

Counsel upon both sides being present.

The Court: Gentlemen, I asked counsel to come in because I have a note here signed by the Foreman of the Jury which I will read. It says, "Judge Nevin: What effect if any does the statement 'services rendered or to be rendered' contribute to the decision of the Jury? (Counts # 1, 2, 3 & 4) Tola Anderson, Foreman."

Now, I haven't answered the question. So far as I am concerned I don't intend to answer the question. In the first place, I don't know there is any answer that I can give to what the question is. I did not want to do anything without, of course, counsel knowing what I am doing and having it appear in the record, and that is the reason I had you come in. Now there it is. You Gentlemen can look at it. There is nothing that I can say.

I always think, Gentlemen, that after a jury goes out the less that is said to them by the Court the better it is, because the first thing you know, keep telling something piecemeal, it isn't connected up with what you have said heretofore, and I have always made it a practice to say as little as I can to the jury. However, I did not want to just take an arbitrary position in the matter, without counsel knowing about it.

As far as the Court is concerned, speaking for myself, I would simply tell the jury that the Court cannot answer their question; those are matters they will have to decide for themselves. That is what I think it is.

Mr. Kelley: Would your Honor give us a moment or two to confer?

The Court: Certainly. Just a minute before you go. I intended to excuse the jury at five o'clock anyhow and have them come back tomorrow morning. Now, my reasons for that are several. In the first place, most of these jurors live away from Dayton. They don live here. They are as much as thirty, forty, fifty miles from here. Some of them are ladies who may have to go home after dark and all that, and I presume that they have their affairs at home. I have no objection to having them come back tomorrow morning. They could come back earlier than eleven o'clock, if they wish, say at ten o'clock, as far as I am concerned, any time that suits them, go right to the jury room and go on with their deliberations.

I wouldn't keep them together. I do not think it is a case where it is necessary to keep them all locked up in a hotel room. Sometimes we have cases where those things are essential, but I do not think it is anything that is necessary here. So, if you Gentlemen prefer, I can excuse them until tomorrow morning first and then you could confer, or you can confer first and I will wait until you come back, whichever you wish.

Mr. Kelley: If your Honor would give us about three or four minutes to confer, why, we will be very happy to state our position on both of those matters.

The Court: I will wait right here on the bench and after I have heard from you I will know what to do about the jury. (Counsel for defendants confer.) Do you want to make a statement?

Mr. Kelley: Counsel for both defendants have conferred and have authorized me to speak on behalf of both and we are in accord with the views expressed by the Court in both connections.

The Court: Does the government wish to make any statement?

Mr. O'Donnell: We are likewise in accord with the views expressed by the Court.

The Court: Very well, Gentlemen. Now I will call in the jury and I will tell them that I have this inquiry but it is nothing that the Court can answer; that is a matter entirely within their hands. I do not want to say anything about it. I don't think I should. I don't want to ignore it. I want to let them know I have it. I can't very well say I haven't got it; they would think the bailiff didn't give it to me. I think if I just say that I have and it is an inquiry that the Court can't answer, it is a matter they will have to decide for themselves and stop right there. In fact, I think I will let Miss Fischer read it. Now you read that so Mr. Kelley can hear it, if you please.

(The reporter read as follows:) "I have the inquiry which your Foreman sent in to me. This is an inquiry which the Court cannot answer, but one which you will have to decide for yourselves."

Mr. Kelley: That is agreeable.

The Court: Have Miss Fischer read it so there won't be any question about it. Then I will excuse them. I will ask them if they would rather come back a little earlier, say, ten o'clock; if not, then they could come at eleven o'clock. Very well. Bring in the jury.

Thereupon the jury returned into the court room and the following proceedings were had:

The Court: Now, Members of the Jury, Miss Fischer will read to you a statement by the Court.

(The reporter read said statement, as follows: "I have the inquiry which your Foreman sent in to me. This is an inquiry which the Court cannot answer, but one which you will have to decide for yourselves.")

The Court: Now, Members of the Jury, I have conferred with counsel and it is agreeable to excuse you until to-

morrow morning. You don't have to, but would you prefer to come back a little earlier than eleven o'clock? If you do, you can; if you do not, why, you don't have to. Whatever you say about it. What do you say, Mr. Foreman?

The Foreman: I would like to be here earlier than eleven o'clock. It would be agreeable to me to be here at nine o'clock.

The Court: You don't have to come, but I thought maybe some of you would like to be in at ten o'clock, or maybe earlier than ten.

The Foreman: Ten o'clock.

The Court: That is all right. Well, then, I will recess the further hearing of this cause until tomorrow morning at ten o'clock. When you come tomorrow morning, please go right to the jury room. Don't come in here because we have another case. Just go right to the jury room and I guess we better leave with Miss Fischer, our official custodian, all the exhibits and documents which she sent in to you. Are they in the jury room now?

The Foreman: Yes, sir.

The Court: Well, then, perhaps you better retire to the jury room and if you will get those together, Mr. Foreman, and put them in an envelope and have them delivered to the bailiff and he will give them to Miss Fischer and tomorrow morning when you come back in—

Juror No. 6: Mr. Judge, your Honor, you said we don't have to come in until eleven.

The Court: I haven't adjourned until eleven. It is all right with me. Has somebody else died over at your place?

Juror No. 6: I will be in at eleven. They can be in at ten.

The Court: I just left it up to you. You don't need to come until eleven, if you prefer. I thought you would

rather come at eleven. Just as you please about it. Don't you want to come until eleven?

Juror No. 6: No, your Honor. I would like to come in at eleven.

The Court: All right, eleven o'clock tomorrow morning. Ladies and Gentlemen, be here at eleven o'clock. I will recess the further hearing of this cause now until eleven o'clock tomorrow morning and go to the jury room, as I have said, and we will send the exhibits in to you at that time. You give them to Miss Fischer tonight.

Now bear in mind the admonition I have heretofore given you; don't say or do anything that would cause any suspicion of any kind, because this case is now in your hands. We could under the law keep you together, but I do not think that is necessary. You may all go to your homes. But do not talk about the case to anybody. Be here tomorrow morning at eleven o'clock. Go right to the jury room, then the exhibits will be sent in to you at that time.

Adjourn court until tomorrow morning at 11 o'clock.

Thereupon court was adjourned until tomorrow morning at 11 o'clock.

Morning Session.

Thursday, June 5, 1952.

Court met pursuant to adjournment. The jury being present and counsel being present as follows: Messrs. Aug and Ruffin for the government and Messrs. Kelley, Campbell and Svoboda for the defendants, the following proceedings were had: (Out of the presence of the jury:) 12:30 P. M.

The Court: Now, Gentlemen, I have this note from the Foreman of our jury: "Judge Nevin: The jury would like to have further instructions and/or the Court's charges as read to the jury (a copy). Tom Anderson, Foreman."

Now, Gentlemen, I have here my charge exactly as I read it to the jury. I did not deviate from it at all. There are, as you will see, if you look at it, some pencil notes in it in this way: that is, when my secretary ran it off, there is space in there so if I wanted to add something that I had overlooked, for example, where I said: "that the defendants or either of them," well, that is written in pencil. When I read it to the jury, of course, I read it with those notations in. It is exactly what I read to the jury. Just a few words that you will see are in lead pencil. One time here it says, "On or about January 20, 1950." Well, I found that should be "October 1, 1950, and continued up until on or about September 26, 1951." That had been written originally "October 26, 1951." Then in checking back I found that those dates should be corrected and they are corrected you will find in here in lead pencil.

Now, so far as the Court is concerned, I haven't the slightest objection to letting the jury have this charge exactly as I read it. I have no objection to rereading the charge, but I will not read a portion of the charge because I think if you take it out of context it may or may not express what the Court had in mind, what I said in my charge; that is to say, something I said back here on page 20 may have some connection with what I said on page 2. I don't know. I tried to keep the continuity of the thing as much as I could. I would either read the whole charge or I will send the charge in as it is, or I won't do either one of those things if counsel think I should not on either side. But I will not read a portion of it, because I think that is misleading and improper and perhaps not convey to the jury the thought that the Court had in mind at the time that I delivered it.

I will pursue whatever course counsel wish. I am not going to do anything that counsel on either side object to. I knew it is not infrequently done, of course, to give the jury further instructions, but they do not ask for any further instructions or any explanation of anything that I have charged. What they are asking me for, as you see, is that I either read the charge to them or send it in.

I personally can see no objection to either course as long as it is kept as one document, so we have the whole story instead of taking it piecemeal.

If counsel would like to confer about the matter, of course, you may do so.

Mr. Kelley: Could we have just about three minutes to confer?

The Court: Sure. It is perfectly all right.

Mr. Kelley: Mr. Canny is in the building but is not feeling well and we can reach him.

The Court: Oh, certainly.

(Counsel for the defendants confer.)

Mr. Kelley: Your Honor, we have just conferred with Mr. Canny. The joint v' w of counsel for the defendants is this: We recognize and agree fully with the Court's observation that it would not be well to read a portion of the charge to the jury and we sense that the same mischief that would arise by reading a portion only could well arise by sending the charge in to the jury. Let us assume that there are some jurors who desire to look at a specific portion of the charge. The expectation is that they would refer to that portion and to that portion alone. Jurors who might be of a different view in these discussions would thus be put in a position of insisting that it all be read and probably would not attain that desire. I think the same mischief well could arise and probably would arise in sending the charge in. Thus, the only alternative would be to read the charge once more in its entirety. I suggest then we haven't reached the end. This charge was slowly, painstakingly, clearly given from this bench yesterday. If it were to be read again now another hour and three-quarters involved. Although time is not of supreme importance, if it were read again who is to say that in another hour another juror might want it read a third time.

I think that mischief invariably flows from disturbing the status quo of this jury now in any way and, therefore, it is the position of the defendants that we oppose and would for the purpose of the record, therefore, object to any further reading of the charge in portion or in its entirety. If the Court felt he wanted to read it all, we have no good basis to object other than that in another hour the same request might be made ad infinitum.

Mr. Aug: We feel that this is a matter that is entirely within the discretion of the Court and we have no firm convictions one way or the other and express none.

The Court: Well, Gentlemen, I will not send the charge in and I am not going to read it, if counsel for defendants feel that they would object to it.

Mr. Kelley: Your Honor, excuse me for rising again. I hardly think this is necessary, but I am sure that the fact that we have objected to it should not in any way be conveyed to the jury—the fact that we have objected to this should in no sense be conveyed to the jury.

The Court: I didn't quite hear.

Mr. Kelley: The fact we have entered an objection opposing this request, the knowledge of that opposition should not be brought home to the jury because it would prejudice us.

The Court: Oh, no. I am not going to tell the jury anything about what took place in here. The reason I asked counsel about it is, I thought if all counsel agreed, I want you to know, so far as the Court is concerned, I would have no objection to sending the copy in. I think the matter does lie largely within the discretion of the Court. On the other hand, I feel that the whole charge must be read, if they are going to have any part of it. I don't believe in extracting any portion of it. I think that is wrong. I think it is unfair to both sides.

Mr. Aug: It occurs to the government that the jury must have a specific legal question in mind which they might feel should be answered and under the circumstances the government would have no objection to the Court's charge as written being submitted to the jury for their consideration.

The Court: I understand that, but the defendants think that perhaps it would be better not. I will not send it in, Gentlemen. I have tried as nearly as I could to try to keep any error out of this case, except such errors as I may have made on rulings of law. Of course, I mean by that, I do not admit that I made any, please have the record show that emphatically, but it is not inconceivable that I might, and the fact of the matter is, I think, that the Court of Appeals on one or two occasions have found that I did. But be that as it may, I endeavored anyhow to try to keep any error out of it and it might be that while it is a matter entirely within my discretion, I do not think I would abuse my discretion. At the same time, I would not want anything to happen in this case and have the defendants feel, if there should be a conviction, that they had been unjustly and unfairly treated and unfairly convicted. Of course, if there is an acquittal it all washes out, that is the end of it. Perhaps the jury won't agree. I don't know. I don't want to do anything that is going to disturb the status, whatever it may be, in the jury room.

I do not particularly crave the privilege of reading this thing again because it was quite a little undertaking yesterday and I had to read it over three or four times before I came on here to see it was all right, as I think, and I must say I am getting a little tired of it. So there would be no pleasure in reading it as far as I am concerned.

Well, it is ten minutes to one. I think what I will do, if it is agreeable to counsel, perhaps we will have the jury come in and I will excuse them until two o'clock. I think I will make a statement like I did yesterday and let Miss

Fischer read it and I won't say anything that I might not have conveyed to counsel. This is what I will say, Gentlemen: You can suggest any modification, if you have something. "Members of the Jury, I have received your request wherein you state that the jury would like to have further instructions and/or the Court's charges as read to the jury. This request was signed by your foreman, Mr. Anderson. It is the view of the Court that anything that might now be stated by way of further instructions or with regard to reading the charge or sending it into the jury room might be inappropriate and the Court is of the opinion it would not be proper to do otherwise than to have you follow the instructions in the charge as given to you as you now recall." Do you think that is all right?

Mr. Kelley: Yes, sir.

The Court: Does that cover it?

Mr. Aug: It is all right.

The Court: When the jury comes in I will have Miss Fischer read that statement just as it is. I won't say anything, except I will tell them Miss Fischer will read the answer to this request and then you read it, Miss Fischer, and then I will excuse the jury until two o'clock this afternoon. Go to their jury room in the meantime and I will have the foreman gather up all the exhibits and leave them with Miss Fischer, the custodian, from whom they can get them at two o'clock. Very well. Bring in the jury.

Thereupon the jury returned into the court room and the following proceedings were had:

The Court: Members of the Jury, I received the note that was sent in to me, signed by Mr. Anderson, your foreman. I have dictated to Miss Fischer the answer to your inquiry. She will read that now. That will be the answer to the inquiry which you sent in.

(The reporter read said answer as follows: "Members of the Jury, I have received your request wherein you

state that the jury would like to have further instructions and or the Court's charges as read to the jury. This request was signed by your foreman, Mr. Anderson. It is the view of the Court that anything that might now be stated by way of further instructions or with regard to reading the charge or sending it into the jury room might be inappropriate and the Court is of the opinion it would not be proper to do otherwise than to have you follow the instructions in the charge as given to you as you now recall.")

The Court: Now, Members of the Jury, it is time for the noon recess and I am now going to excuse you until two o'clock this afternoon. When you come back at two o'clock, please go right to the jury room because I have other matters here and then proceed with your deliberations and considerations of the case.

Now, Mr. Foreman, would you please gather up and put in the envelope the exhibits and whatever papers have been turned over to you and give them to the bailiff so he can give them to Miss Fischer. She is the official custodian of them. Then when you come back at two o'clock she will see that they are given to the bailiff or the marshal and immediately handed to you. Of course, you will bear in mind my usual admonition. I won't go over it again because I told you about it so many times. You may now be excused and return, if you please, at two o'clock.

Thereupon court was adjourned until two o'clock of the afternoon of the same day.

Afternoon Session.

Thursday, June 5, 1952.

Court met pursuant to adjournment. Counsel being present as heretofore noted, the following proceedings were had:

The Court: Gentlemen, I asked counsel to come in because I received through the bailiff and the marshal a

statement from the Foreman of the Jury and I want to keep counsel advised of everything comes to the Court, so you will know it and so it is in the record.

The Foreman, so Mr. Keller, our bailiff, stated, rapped on the door and told him to tell the Judge that the jury were unable to arrive at a verdict. I haven't sent any word back or done anything about the matter, waiting to tell you Gentlemen.

I propose to tell the bailiff now to tell the Foreman that the Court said they should continue with their deliberations. That is all.

I may say in the record what you Gentlemen already know and what the record shows: We were four weeks exactly to the day when we opened the case until I charged the jury. We started on Wednesday the 7th day of May and I charged the jury, as the record shows, yesterday, which was Wednesday the 4th day of June, which is four weeks exactly in the trial of this case.

I think the jury can certainly give it a little more consideration than to stop it at the first time that they think that they can't arrive at a verdict. I think when a reasonable time has elapsed, if they can't arrive at a verdict, the Court, of course, will excuse them. There is no desire upon the part of the Court to coerce the jury in any way whatsoever. That is entirely wrong in my opinion. But on the other hand there has been too much time, too much expense of everybody involved in this case to have the jurors feel that it is something that can just be passed over lightly. I think they should feel, perhaps, their responsibility in the matter a little more than maybe they do.

At any event, you deliver the message, Mr. Keller—

Mr. Keller: Yes, sir.

The Court: They can continue with their deliberations and when I feel that a reasonable time has elapsed, if nothing is done in the meantime, then I will notify them, of course, that that disposes of the matter in the light of the circumstances as they exist at that time. But I do not think that that hour has arrived as yet.

You see all of the time has not been taken, could not have been taken in deliberations. In the first place they did not get back here this morning until 11 o'clock. Could have come earlier, but our mortician objected to it, so we put it over until 11 o'clock. And then in the meantime, of course, there was the whole evening and night, when they were separated, and then we had to take out time yesterday, as well as today for their lunch. So that all of the time that we have been sitting around here waiting, has not been spent and could not have been spent in deliberations in the jury room. I haven't attempted to figure it up by hours, but I know it hasn't been many hours that they could have put in, because we haven't had so many hours since it was submitted to them.

At any event, I wanted to keep counsel advised and let you know. Anything I hear, of course, I will immediately report to you and that is the latest bulletin up to date. Any further persons heard from, I will notify you.

We will recess now, until we hear from the outlying wards.

And thereupon court recessed as stated. And later on the same day, to-wit, 5:18 p. m., the following proceedings were had:

The Court: Bring in the jury.

The Bailiff: The jury would like a few minutes more.

The Court: All right.

And later on the same day, to-wit, 6 p. m., the following proceedings were had:

The Court: Bring in the jury.

And thereupon the jury returned into the court room and the following proceedings were had:

The Court: Mr. Foreman, have you arrived at a verdict?

The Foreman: Yes, your Honor.

The Court: Pass it to the bailiff, please, or the marshal, who will give it to the clerk.

The Clerk: (Reads) "District Court of the United States, Southern District of Ohio, Western Division, at Dayton, Ohio. The United States of America vs. Robert G. Hollifield, Sr., William P. Opper, No. 2669, Criminal. We, the Jury, herein do find the defendant Robert G. Hollifield, Sr., guilty in manner and form as charged in the first, second, third, fourth, fifth counts of said indictment. Thomas F. Anderson, Foreman."

"District Court of the United States, Southern District of Ohio, Western Division, at Dayton, Ohio. The United States of America vs. Robert G. Hollifield, Sr., William P. Opper. No. 2669, Criminal. We, the Jury, herein do find the defendant William P. Opper guilty in manner and form as charged in the first, second, third, fourth, fifth counts of said indictment and guilty as charged in the remaining counts thereof. Thomas F. Anderson, Foreman."

The Court: Would counsel like to see the verdicts?

Mr. Kelley: I respectfully request that the jury be polled.

The Court: I haven't come to that. I wondered if counsel would like to see these verdicts before I say anything, both sides. They all seem to be in proper form, as far as I can see.

Now, Members of the Jury, I have in my hand here a verdict against Robert G. Hollifield, Sr., finding him guilty in manner and form as charged in the first, second, third, fourth and fifth counts of the indictment. Is this your verdict? (The only answers heard by the reporter, whose back was to the jury, were in the affirmative.) So say you all.

I have in my hand here the verdict in which it is stated that "We do find the defendant William P. Opper guilty in manner and form as charged in the first, second, third, fourth and fifth counts of the indictment." Is this your

verdict, members of the Jury: (The only answers heard by the reporter, whose back was to the jury, were in the affirmative.) Very well.

Now, Members of the Jury, counsel would like to have—

Mr. Kelley: I should like to have the jury individually polled.

The Court: You don't give me time, Mr. Kelley, to get to it.

Mr. Kelley: All right, your Honor.

The Court: Now counsel have asked that the jury be polled, that your names be called individually and you answer whether or not, in each instance—inquire as to each of the defendants separately, as to Robert G. Hollifield and then William Opper, and then you answer. That is up to you. Poll the jury.

The Clerk: Thomas F. Anderson, is this your verdict as to Robert G. Hollifield?

Mr. Anderson: It is.

The Clerk: William F. McCandless, as to Robert G. Hollifield, is this your verdict?

Mr. MacCandless: It is.

The Clerk: Mary K. Tobin, is this your verdict as to Robert G. Hollifield?

Mary K. Tobin: It is.

The Clerk: Lillian E. Lewe, is this your verdict as to Robert G. Hollifield?

Lillian E. Lewe: It is.

The Clerk: Otto D. Sands, is this your verdict as to Robert G. Hollifield?

Mr. Sands: It is.

The Clerk: Raymond Marker, is this your verdict as to Robert G. Hollifield?

Mr. Marker: I signed the paper.

The Court: No. That is not the answer. Is that your verdict? Say yes or no.

Mr. Marker: I guess it is.

The Court: That is not the answer. The question is, is that your verdict. You may say yes or no.

Mr. Kelley: If your Honor please, the defense moves that this jury be sent back for further deliberation, sir.

The Court: You may answer the question, Mr. Marker, whether that is your verdict, yes or no.

Mr. Marker: Yes, I guess.

The Court: Mr. Marker, will you answer the question? Please state whether or not that is your verdict as to Robert Hollifield. Answer it yes or no.

Mr. Marker: (Hesitates) Can't I say "I guess"?

The Court: No, Mr. Marker, you can't say "I guess". You will have to say—you are being polled now and the question is whether or not this is your verdict. You must say, "Yes, it is" or "No, it is not", whichever you see fit to say. It must be one or the other. You can't guess at it.

Mr. Kelley: In justice name—

The Court: Pardon me, Mr. Kelley. I am running this Court. Please be seated. You answer the question yes or no, Mr. Marker, as you see fit. That is up to you.

Mr. Marker: Yes.

The Court: All right. Go to the next juror.

Mr. Kelley: May the record show the time that has taken place before this Gentleman expressed himself?

The Court: The record may show anything you please.

Mr. Kelley: May the record show many minutes passed?

The Court: I wanted to know from Mr. Marker whether that was his verdict and he said: "Yes, it is."

Mr. Kelley: May the record show before he responded many minutes passed and may it show that the juror has bent his head in great perturbation? May the record show that the juror is now in tears?

The Court: You will have everybody in tears, if you keep on.

Mr. Kelley: If your Honor please, may all of these remarks go upon this record?

The Court: Call the rest of the jury, will you, please?

The Clerk: Rita Hussmann, is this your verdict as to Robert Hollifield?

Rita Hussmann: Yes.

The Clerk: Carl W. Epley, is this your verdict as to Robert Hollifield?

Mr. Epley: Yes.

The Clerk: Marguerite Stoltz, is this your verdict as to Robert Hollifield?

Marguerite Stoltz: It is.

The Clerk: Robert J. McCarthy, is this your verdict as to Robert Hollifield?

Mr. McCarthy: It is.

The Clerk: Helen See, is this your verdict as to Robert Hollifield?

Helen See: It is.

The Clerk: John E. Parker, is this your verdict as to Robert Hollifield?

Mr. Parker: It is.

The Court: Now ask the same question about Opper.

The Clerk: Thomas F. Anderson, is this your verdict as to William P. Opper?

Mr. Anderson: It is.

The Clerk: William F. MacCandless, is this your verdict as to William P. Opper?

Mr. MacCandless: It is.

The Clerk: Mary K. Tobin, is this your verdict as to William P. Opper?

Mary K. Tobin: It is.

The Clerk: Lillian E. Lewe, is this your verdict as to William P. Opper?

Lillian E. Lewe: It is.

The Clerk: Otto D. Sands, is this your verdict as to William P. Opper?

Mr. Sands: It is.

The Clerk: Raymond J. Marker, is this your verdict as to William P. Opper?

Mr. Marker: I said it once. Yes, yes it is.

The Clerk: Rita Hussmann, is this your verdict, as to William P. Opper?

Rita Hussmann: It is.

The Clerk: Carl W. Epley, is this your verdict, as to William P. Opper?

Mr. Epley: It is.

The Clerk: Marguerite Stoltz, is this your verdict, as to William P. Opper?

Marguerite Stoltz: It is.

The Clerk: Robert J. McCarthy, is this your verdict as to William P. Opper?

Mr. McCarthy: It is.

The Clerk: Helen See, is this your verdict as to William P. Opper?

Helen See: It is.

The Clerk: John E. Parker, is this your verdict as to William P. Opper?

Mr. Parker: It is.

The Court: So say you all. Now, members of the Jury, that will conclude, of course, your consideration of this case and the termination of the case. Now, we have another case on and I would like to ask you all to return tomorrow morning at 11 o'clock and we will have to use some of you. I don't think it will be necessary to use all of you because we have a number of jurors in the box, but we haven't enough jurors left without using you, because you are on our regular panel.

Return tomorrow morning, if you please, at 11 o'clock, when we will proceed with the other case.

I thank you very much and you are now excused until tomorrow morning at 11 o'clock.

Thereupon the jury retired from the court room and the following proceedings were had out of the presence of the jury:

The Court: Now, Gentlemen, the rule 33 provides for motion for a new trial which I assume counsel for the respective defendants will wish to file. That provides that a motion for a new trial based on any other ground excepting discovery of evidence shall be made within five days after a verdict or finding of guilty, or within such further time as the Court may fix during the five-day period.

Now, this is the 5th day of June and, therefore, I will set this matter over until the 11th day of June for sentence, to give counsel an opportunity, if they wish to do so, to file a motion for a new trial. If that motion for a new trial should be overruled at that time, sentence will be pronounced. There will not be any bail, Gentlemen, in

this court. I want to tell counsel in advance, I think it is only fair, so that you may be prepared accordingly. If there is any bail to be asked for or given you must make your application for it to the Court of Appeals. There should not be any stay of sentence. When I pronounce sentence on the 11th day of June there will be no stay of any kind. Whatever affairs defendants have, if any, if they want to put them in order, they must do that between now and the 11th day of June. At that time sentence is pronounced. As far as this Court is concerned the matter will be closed. But I will, of course, wait until motions for a new trial are filed. Of course, counsel have the right to do that. I am not passing on those motions at this moment, but I am simply, in fairness to counsel and to the defendants, telling them what the procedure will be, if I should overrule them, so that they would not come and be surprised or shocked at that time, or feel some other procedure should be taken. So counsel and the defendants may arrange accordingly and the defendants, so far as the Court is concerned, may remain on their same bond.

Is that satisfactory to the government?

Mr. Aug: Very well, your Honor.

Mr. Kelley: Would your Honor hear me for one moment on two things? First, the date that your Honor has fixed, I ask that that date, if your Honor please, be extended. The date set is Wednesday. I ask that it be sent to the Monday following. I ask it for personal reasons I do not wish to mention. I will state it and rest it there.

The Court: You do not need to press that. As far as the Court is concerned, I have no objection to that, to put it over to Monday, the 16th, if the government hasn't.

Mr. Aug: No objection, your Honor.

The Court: Let's say at 1 o'clock that afternoon.

Mr. Kelley: I am very grateful to your Honor. The second thing, your Honor has said that bond will not be granted in this court. The rules require that in applying to the Circuit Court one must bring the record or so much thereof as will demonstrate a substantial question for an appellate court. I suggest the fact that it is prejudicial to these defendants. I am informed that this Court undertakes another jury trial immediately. It is my understanding that there is but one official reporter in this court. It is my understanding, I think worthy of mention, that that lady has other problems, too, with an ill mother. I do wish to go to the appellate court for bond, but I can't go there under the rules until I have the record, or so much thereof as will demonstrate our point. And unfortunately, the exigencies of this Court with another trial, and personal matters of great moment to the lone reporter, make it virtually impossible for us to comply with the rules.

The Court: Tomorrow I hope and expect to get a jury in the case we are going to try. Then that case will be continued until the 16th day of June, because the District Attorney is required, been ordered to go to Washington to meet with the new Attorney General along with the other district attorneys of the United States. So, there will be no reason why, that I know of, next week you will not be able to get out whatever you wish to have by way of transcript.

Mr. Kelley: Would I embarrass Miss Fischer now to state that it is our desire that in reason, as rapidly as she may, that this record be made.

The Court: I don't know what the Court of Appeals' requirements are.

Mr. Kelley: The rule provides—

The Court: Of course, those are rules of the Court of Appeals. They are not the rules, so far as this court is concerned.

Mr. Kelley: I am bringing to your Honor's attention a fact.

The Court: If they require something up there, why, of course, that is unfair under their rule. So far as this Court is concerned, why I am through, after I pronounce sentence, Gentlemen. Whatever you may have to have for the Court of Appeals, Gentlemen, of course, is a matter that you will have to determine for yourselves, or find out from the Court of Appeals. I can't pass on that, because that is a matter for that Court not for this Court, as you Gentlemen well understand.

Mr. Keiley: Your Honor, my only request and I will not argue it,—my only request is this, that I have demonstrated a difficulty in obtaining a record which is a condition precedent to the application for bonding the appellate court, and without argument I now request that a stay be allowed until the record is made and we will do everything by way of tender and otherwise necessary.

The Court: No. There will be no stay beyond the 16th day of June. I prefer to have it on the 11th, but I will defer to counsel's wishes. The 16th day of June, at one o'clock will mark the time when this Court is going to dispose of this case, as far as this Court is concerned. Now, in the meantime, you may arrange with Miss Fischer to get out so much of the record as you can, or all of it. Whatever you think is necessary. I don't know. I say I don't know what the Court of Appeals requires. Do you know, Mr. O'Donnell?

Mr. O'Donnell: I do not, your Honor. Of course, I went through the same procedure in the Kratz and Razete case. You had a daily transcript, but what was filed in the Court of Appeals, I am unable to say and I am not familiar with the rule.

The Court: Go ahead and get it out. We have some other matter here. We will have to arrange and get some other reporter here so these Gentlemen can get out so

much of the transcript in this case as they deem is necessary to raise the bond, so far as the bail is concerned. That is all there is. That is all you are going to apply for. Whether or not the Court of Appeals will grant the bond, of course, that is entirely up to them and not up to this Court.

We will fix the time for the sentence in these cases, the two defendants, as one o'clock on the afternoon of Monday, June 16, 1952. The defendants may remain on their same bond. We will adjourn court until tomorrow morning at 11 o'clock.

Thereupon court was adjourned until 11 o'clock of the morning of the next day.

Afternoon Session.

Monday, June 16, 1952.

Court met pursuant to adjournment. Vincent J. Aug being present for the government and counsel as heretofore noted being present for the defendants, the following proceedings were had.

The Court: Do counsel wish to be heard?

Mr. Kelley: I should like to be heard very briefly, if the Court please. I should like to file with the Court, at this time, a supplemental affidavit in connection with specification 19 of the motion for a new trial, filed on behalf of the defendant Opper, and have been authorized and requested to file the same as likewise applying to the motion for a new trial, filed on behalf of the defendant Hollifield, and in connection with the filing of this supplemental affidavit, would request and move the Court, respectfully, on behalf of both defendants, that the Court conduct an investigation of its own whereby all of the jurors can be interrogated as to the occurrences set forth in said affidavit and supplemental affidavit, of the juror Raymond J. Marker. Just a moment or two ago there was served upon the government attorneys and Court a copy.

The Court: You have permission to file it.

Mr. Kelley: Beyond the filing of such affidavit and the oral motion just stated, it will not be our purpose to further consume the Court's time as to the various specifications in our motion for a new trial, because we are satisfied the Court is familiar as we are with the progress of the case.

The Court: Has the government seen this affidavit?

Mr. Aug: We have seen the affidavit and have been served with a copy.

The Court: I haven't seen it.

Mr. Aug: This is a copy that was served.

The Court: I will get the original in a minute. Miss Boyd will bring it in. Counsel for the government wish to be heard?

Mr. Aug: Your Honor, just briefly with respect to the affidavits which have been filed with the Court, the affidavits of the juror Marker. But first with relation to the eighteenth specification in the motion filed by counsel for defense, it is stated in that motion that the Court was polling the jury, which, of course, is inaccurate. The poll of the jury was being taken by the clerk of the court.

With respect to the affidavits, the first affidavit filed and signed by the juror Marker, it seems to me that that affidavit raises two questions, the first being some alleged impropriety that took place in the jury room, in the secrecy of the jury room and during the deliberations of the jury. With respect to that portion of the affidavit, if the Court please, the authorities are overwhelmingly and unanimously to the effect that a juror cannot impeach his verdict, once that verdict has been made and arrived at. We submit to the Court this affidavit should not be received by the Court, nor should the supplemental affidavit be received by the Court.

The second point which is raised under the original affidavit on the part of Marker, it seems to me goes to something in the mind of Marker that has to do with coercion on the part of the Court and I think this record should show that the juror Marker is the same juror for whom this Court arranged the schedule of counsel for the parties, the other jurors and the Court itself, so that this juror could take care of his business in his home town, where he is a funeral director. If the Court will recall, we arranged the convenience of all parties concerned to see to it that he could bury one of his corpses and we would have no session upon a particular day during the course of trial.

The second time this Court went out of its way to convenience juror Marker, at the inconvenience of all of the other parties concerned was during the deliberations of the jury with respect to these two defendants, and if this Court will recall, it was suggested by all the jurors with the exception of Marker that the jury reconvene at 10 o'clock on the second day of their deliberations, so they would have more time in which to consider the case. Marker was the only dissenter from that agreement and this Court again convenienced juror Marker by ordering the jury back at 11 o'clock instead of 10. This record is absolutely void of any suggestion of coercion on the part of the Court with respect to anybody.

If there was any coercion with respect to this jury, I submit to the Court that was on the part of counsel for the defense, when this jury was being polled with respect to its verdict. If the Court will recall as the jury was being polled and they reached the juror Marker and he was being asked whether that was his verdict with respect to the defendant Hollifield, after his hesitation, defense counsel Mr. Kelley stated in unmistakable words of force that the record should show that the juror Marker took many moments to make up his mind. Mr. Kelley pointed out that the juror at the time was in tears.

We submit to the Court that this was coercion on the part of defense counsel for the jury had not been polled as to the defendant Opper, but was going to be polled with

respect to the defendant Opper in a few moments. It seems to me, if there was any coercion in this court room, it was on the part of defense counsel, Mr. Kelley, who was making his record in the presence of Mr. Marker and the presence of the jury, instead of making the record outside of the hearing of the jury, which he would have had a perfect right to do.

So, we request the Court that the affidavit of Mr. Marker originally filed and the affidavit of Mr. Marker supplementarily filed today, both be stricken from the record as being improper parts of the record.

Mr. O'Donnell has suggested a point which I had overlooked, that that portion of the record which was made up by Mr. Kelley, in the presence of the jury, be also stricken from the record of this case.

The Court: This cause is now pending before the Court on two motions filed on behalf of defendant Hollifield, and two motions filed on behalf of defendant Opper.

On behalf of the defendant Hollifield, there is a motion for a new trial, and on behalf of defendant Opper, there is a motion for a new trial. These motions were both filed on June 10, 1952. The motion on behalf of defendant Hollifield sets forth 19 reasons why the defendant Hollifield moves the Court to set aside the verdict herein and grant a new trial. All of the reasons or grounds set forth in the motion for new trial by defendant Hollifield, excepting those contained in the 11th, 12th, 13th, 14th, 18th and 19th grounds thereof, all of which will be disposed of in this decision, have been heretofore, on various occasions, as to some both before and during the trial, and as to others during the trial only, passed on by the Court.

The motion for new trial filed on behalf of defendant Opper contains 20 grounds or reasons, because of which defendant Opper moves the Court to set aside the verdict herein and to grant him a new trial. Everything that is set forth in the motion for new trial filed by defendant Opper in the first 18 reasons or grounds of his motion, except those set forth in paragraphs 12, 15, 16 and 17 of

his motion, which will be disposed of in this decision, has been heretofore, on various occasions, as to some both before and during the trial, and as to others during the trial only, passed on by the Court. In each instance, both as to defendant Hollifield and defendant Opper, the Court has held against the contentions made in the respective motions for new trial, in the paragraphs referred to and the Court here and now adheres to its rulings heretofore made.

The 18th ground set forth in the motion for new trial by defendant Hollifield and the 19th ground of the motion for new trial by defendant Opper, read exactly the same, word for word. The 18th ground set forth in the motion for new trial by defendant Hollifield reads as follows:

"Eighteenth: That the Court erred in refusing defendant's motion and request to order the jury to return to the jury room for further deliberations. At the time said motion was made by defense counsel the Jury was in the Jury Box and was being polled by the Court."

May I say, parenthetically, that this statement is incorrect, as the jury was being polled by the clerk. The jury was polled at the request of defendants. Rule 31 (d) of the Federal Rules of Criminal Procedure provides for such a poll.

"During the polling of the jury it developed that Juror No. 6, Mr. Raymond J. Marker, failed to indicate in response to a question from the Court"—

This, again, is incorrect, parenthetically. No question was asked by the Court. These questions were asked by the clerk, as the record will show.

Now to go on: —"that he had arived at a verdict. Said juror in response to the question by the Court"—which is again incorrect. The answer was made in response to a question by the clerk, as the record in this case will show.

Now to go on: —"when polled said in substance 'I guess.' Whereupon, the defense counsel made the motion to return the Jury for further deliberations on the grounds that all twelve of the jurors had not arrived at a verdict. Said Juror has made an affidavit, which is filed herewith and marked: Exhibit A."

The 19th ground of the motion for new trial by defendant Opper is in exactly the same language, word for word, as the 18th ground in the motion for new trial by defendant Hollifield. The comment of the Court regarding the incorrect statements in the 18th ground in the motion of defendant Hollifield is applicable, therefore, to the 19th ground of the motion of defendant Opper. It will be unnecessary for the Court, therefore, to read again what is stated in the 19th ground of the motion of defendant Opper.

In connection with this ground of the defendants' motions, respectively, the Court wishes to make the following observation: I practiced law actively and continuously for 31 years, both in the State and Federal Courts, before coming on the bench of the Federal Court. During those years it was my privilege to try many cases, both Civil and Criminal. Because of this experience, I know how zealous counsel are to protect and defend what they claim are the rights of their clients, and I am in full accord with the view that counsel should be zealous in these respects.

However, I am also firmly of the opinion, and always was as a practicing attorney, that the zeal of counsel should not be such as to impel counsel to violate the orderly procedure in the conduct of a trial or to interfere with the proper administration of the rule of Court during the progress of this, or any other trial.

I am led to make these observations by reason of what occurred in the court room at the time the jury was being polled, in the instant case, deference to which is made in the 18th and 19th paragraphs of the respective defendants in their motions for a new trial

In the opinion of the Court, it was highly improper, while the jury was being polled, and until the poll had been concluded, for counsel for defendants to arise and move that the jury be sent back for further deliberations or to make other comments of any kind whatsoever, such as shown by the record in this case, while the jurors were being polled by the Clerk. Even the zeal of vigilant and earnest counsel does not provide any warrant for such

conduct. In the present case, as the record will show, while the jury was in the midst of being polled by the Clerk and the juror, Marker, was being inquired of, counsel for defendants not only arose but stepped over towards the jury and said and did everything possible to endeavor to interfere with the answer which the juror was required to make, or at least to confuse the juror and to encourage him not to answer.

The Court is of the opinion that not even the Court itself should at any time interfere with the polling of the jury, or say or do anything during that process, excepting as was done in the instant case, to ask the juror whether or not the verdict which he had signed is, or was, his verdict and to insist that he answer that question "yes" or "no." Beyond that, any comment by the Court would be as improper as the comment of counsel.

After the jury had been polled, counsel had the right, of course, to make such comment, or to call attention to such facts as they deemed proper, but during the polling it was entirely inexcusable, and in the opinion of the Court, based not only upon its experience on the bench, but upon its experience for many years at the bar, wholly unjustified and unjustifiable.

In the 19th ground in the motion of defendant Hollifield and the 20th ground of the motion for new trial of defendant Opper, reference is made to a document called Exhibit A," which is an affidavit purporting to have been signed by the juror, Raymon J. Marker. As to each motion, the alleged affidavit is exactly the same.

In the view of the Court, this affidavit—and that is true also of this supplementary affidavit, so-called, which was filed today—has no standing whatsoever. It has been held many, many times—so often that it is not worthy of the citation of authority, that the verdict of a jury cannot be later set aside because of some subsequent comment or affidavit of a juror as to what took place, either in the jury room or elsewhere. This rule, otherwise invariable, might possibly have some exception in the case of proven fraud. The court is not called upon to pass on that ques-

tion, nor does it do so, because there is no claim of fraud, in any form whatsoever, either in the affidavit itself or the motions of the respective defendants.

There is one statement in the affidavit to which the Court wishes to direct attention in the record, because it is made without the slightest basis or foundation, as the whole of the record in the case will show. That statement is as follows: "but when I was seated in the jury box and was asked individually if it was my verdict I wanted to speak out that it was not my conscientious verdict, but I was afraid the Court would censor me or hold me in contempt of court for changing my verdict after having signed it." That is purely not only a gratuitous but a ridiculous statement and appears to the Court to have been made solely as an excuse, thought of long after the verdict had been recorded and the jury discharged. Upon its own motion the Court here and now orders this alleged affidavit marked Exhibit A in each motion, respectively, stricken from the record upon the grounds that it is not only entirely immaterial and irrelevant but because it is also highly and extremely impertinent. This applies also to the affidavit called "Supplemental Affidavit" of Juror Marker, filed today, June 16, 1952. Defendants may have their exception to this ruling of the Court, of course.

I will not, as suggested by the District Attorney, strike out any portion of the record in this case. The record as it was made up and as it will be transcribed by the court reporter will stand as it is and it will speak for itself.

Upon a consideration of all the grounds, including those heretofore passed upon, and those just now specifically referred to, the Court finds the motion for new trial of the defendant Hollifield not well taken, and that it should be and it is, overruled, as to each and every ground thereof and in its entirety, and that the motion for a new trial filed by and on behalf of defendant Opper is not well taken and that it should be, and it is, overruled as to each and every ground thereof and in its entirety.

There has also been filed on behalf of defendant Holli-

field a motion to arrest judgment, and on behalf of defendant Opper a motion to arrest judgment. Both of these motions were filed on June 10, 1952. The wording of these two motions is in each instance exactly the same; that is to say, the motion to arrest judgment of defendant Hollifield reads exactly the same as the motion to arrest judgment on behalf of defendant Opper. The motion to arrest judgment on behalf of defendant Hollifield reads as follows: "Now comes the defendant Robert George Hollifield, Sr., by his attorney, and moves the Court to arrest judgment because none of the counts of the indictment charges an offense against the United States."

As just indicated, the motion of defendant Opper to arrest judgment is in the exact language of the motion of defendant Hollifield, which I have just read.

These motions present nothing new to the Court, as the Court has passed upon the issue raised by the motions on several occasions heretofore. The Court is of the opinion, and so finds therefore, that the motion to arrest judgment filed on behalf of defendant Hollifield is not well taken and that it should be, and it is, overruled.

The Court is of the opinion that the motion to arrest judgment filed on behalf of defendant Opper is not well taken and that it should be, and it is, overruled.

And now, if the defendants are ready, if you please. Let them remain seated just a minute. It has been my view in cases of this character that as a general rule the person who offers the gratuity or compensation and pays it is much worse than the recipient, because we find in many such cases that the recipient who probably is receiving a more or less meager salary is tempted to do things or commit violations of the law, which ordinarily he would not do or commit, except for the temptation that is held out to him.

That was exactly the view of the Court in the recent case involving the defendants Razete and Kratz. After hearing all of the evidence in that case, the Court was and still is of the opinion that the defendant Kratz had been tempted by defendant Razete beyond his ability to resist and that he yielded therefore to the temptations presented.

But after hearing all of the testimony in the instant case, the Court is inclined to believe that the defendant Hollifield was not tempted in the first instance by the defendant Opper, but that on the contrary, knowing full well that in accepting any favors or gratuities, so-called, or compensation, he was violating not only the statutory law, but as well his moral obligation to his government and to his country. Nevertheless defendant Hollifield went ahead in his violation irrespective of and in defiance of the statute.

This fact as to Hollifield is shown by the proof in the case. The record shows, among other things, that defendant Hollifield put in a long-distance telephone call from his home in Dayton, Ohio, for defendant Opper at his home in Chicago, Illinois, and made an appointment to meet defendant Opper in Chicago the next day; that on the next day which was Saturday, Hollifield took a plane and traveled by airplane from Dayton to Chicago, where he went to the office of defendant Opper.

The record shows that he had indicated in his long-distance call to defendant Opper that on his visit to Chicago he was expecting to receive some compensation. The record shows that Hollifield went to defendant Opper's office, in Chicago, and that while defendant Hollifield was in Chicago on that trip he received from defendant Opper $1000 in United States Currency. The details regarding the withdrawal of that money from the bank, the check, the bank statement and so forth, of defendant Opper are also in evidence in the case.

The record shows that after receiving this $1000 and on the same Saturday, but later in the day, Hollifield took a plane in Chicago and returned by air to Dayton, Ohio.

The receipt of this money by defendant Hollifield together with other moneys given to him by defendant Opper is acknowledged by Hollifield in both his verbal and written statements. His written statements are Exhibits 37 and 38 in this case.

The payment to defendant Hollifield by defendant Opper of the $1000 and later a payment of $200 is acknowledged

by defendant Opper, both in oral statements made by him, as testified to by various witnesses and in his letter signed by him, now Exhibit 41 in this case. In that letter defendant Opper claims that the payment of the money to defendant Hollifield was by way of—intended to be merely a loan. However, none of the formalities attached to a loan in the usual transaction of business were in any way complied with.

Under all of the evidence and circumstances as shown by the record in this case, the Court is of the opinion that in this particular case the defendant Hollifield in his violation of the statute is equally guilty as the defendant Opper; that defendant Opper did, however, aid and abet, and within the meaning of Section 2, Title 18, U. S. Code, procure and counsel defendant Hollifield in the commission by defendant Hollifield of the violation of the provisions of Section 281, Title 18, of the United States Code, is clear under the proof in this case.

It is because of these views gathered from the whole evidence in this case and based upon the whole record that the Court has reached its conclusion with respect to the sentences to be imposed on the respective defendants.

Now, if the defendants will please come forward. (After the defendants had come forward): The law provides that if guilty the defendants shall be fined "not more than $10,000 or imprisoned not more than two years or both."

As to the defendant Opper the sentence is that he be committed to the custody of the Attorney General of the United States, on the first count of the indictment for a period of two years, and on the fourth count of the indictment for a period of one year. The sentence on the fourth count of the indictment to run consecutively with the sentence on the first count of the indictment. That on the second count of the indictment defendant Opper pay a fine of $500 and stand committed until the fine is paid or otherwise discharged by law. That on the third count of the indictment defendant Opper pay a fine of $500 and stand committed until the fine is paid or otherwise discharged

by law. That on the fifth count of the indictment defendant Opper be remanded to the custody of the Attorney General of the United States for a period of a year and a day. The sentence on the fifth count, however, to run concurrently with the sentence on the first and fourth counts of the indictment.

As to the defendant Hollifield, that he be committed to the custody of the Attorney General of the United States, on the first count of the indictment for a period of two years and that on the fourth count of the indictment he be committed to the custody of the Attorney General of the United States for a period of one year. The sentence on the fourth count of the indictment to run consecutively with the sentence on the first count of the indictment. That on the second count of the indictment defendant Hollifield pay a fine of $500 and stand committed until the fine is paid or otherwise discharged by law. That on the third count of the indictment defendant Hollifield pay a fine of $500 and stand committed until the fine is paid or otherwise discharged by law. That on the fifth count of the indictment defendant Hollifield be committed to the custody of the Attorney General of the United States for a period of a year and a day; that sentence, however on the fifth count of the indictment to run concurrently with the sentence on the first and fourth counts of the indictment.

That is all.

Mr. Canny: Now, if your Honor please, we expect to file our appeal notice immediately and it is required that we move for bail. I am acquainted with your Honor's fixed rule in that matter, but it is required that we make that application for bail with your Honor, which we now do, we make application for bail pending appeal.

Mr. O'Donnell: If the Court please, as I understand the sentence pronounced, particularly as to the defendant Hollifield, as to count 4, the Court said he shall be committed to the custody of the Attorney General for one year. I am wondering—

The Court: I will read it again. Listen everybody, will you, please? As to the defendant Hollifield, that he be committed to the custody of the Attorney General of the United States, on the first count of the indictment for a period of two years and that on the fourth count of the indictment he be committed to the custody of the Attorney General of the United States for a period of one year. The sentence on the fourth count of the indictment to run consecutively with the sentence on the first count of the indictment. That on the second count of the indictment defendant Hollifield pay a fine of $500 and stand committed until the fine is paid or otherwise discharged by law. That as to the third count of the indictment defendant Hollifield pay a fine of $500 or stand committed until the fine is paid or otherwise discharged by law. That on the fifth count of the indictment defendant Hollifield be committed to the custody of the Attorney General of the United States for a period of a year and a day; that sentence, however, on the fifth count of the indictment to run concurrently with the sentence on the first and fourth counts of the indictment.

Now, is there something that you did not understand about it?

Mr. O'Donnell: No. I was just mistaken. I thought the Court meant to say a year and a day.

The Court: I said on count five of the indictment that was for a year and a day; that was to run concurrently with the other.

Well, I don't want to mix up our record. The record speaks for itself. I prefer to leave it that way.

Mr. Canny: Our motion, I suppose, for bail is overruled for the usual reasons.

The Court: I will deny the application.

Mr. Svoboda: I make the same motion for bail.

The Court: I overrule the motion and deny the application, and remand the defendants to the custody of the United States Marshal and you Gentlemen will have to get your bail, if any, from the Court of Appeals.

I will recess until 2 o'clock this afternoon.

Thereupon court was recessed until 2 o'clock of the afternoon of the same day.

I hereby certify that the foregoing is a true and correct transcript of the trial proceedings in this cause to the best of my ability.

V. ELIZABETH FISCHER,
Official Court Reporter,
U. S. District Court, S. D. O.

9/9/52

CERTIFICATE OF CLERK.

I, Howard E. Parker, Clerk of the District Court of the United States for the Southern District of Ohio, Western Division, do hereby certify that the foregoing pages numbered 1 to 43, and Tr. 44 to Tr. 762, inclusive, contain a true and correct copy of the record and proceedings indicated in the stipulation as to contents of record on appeal on file in the Office of the Clerk of said Court in the above-entitled cause, with the exception of Government's and defendants' exhibits designated in said stipulation,

which exhibits, pursuant to an order of the District Court aforesaid entered on September 4, 1952, are to be transmitted in their original form to the Clerk of the United States Court of Appeals for the Sixth Circuit.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Court in the City of Cincinnati, Ohio, the 16 day of September, 1952.

HOWARD E. PARKER,
Clerk.

(Seal)

PROCEEDINGS IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(February 13, 1954—Before: SIMONS, ALLEN and MARTIN, JJ.)

This cause is argued by John M. Kelley, Jr. for appellant and by Richard Pennington for appellee and is submitted to the Court.

JUDGMENT

(Filed March 26, 1954)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed as to Counts 2 and 3 of the indictment and in all other respects is affirmed. The case is remanded to the District Court with instructions to dismiss Counts 2 and 3 of the indictment so far as they relate to the appellant and to correct appellant's sentence in conformity with the opinion herein.

OPINION

(Filed March 26, 1954)

Before SIMONS, Chief Judge; ALLEN and MARTIN, Circuit Judges.

ALLEN, Circuit Judge. Appellant William J. Opper and Robert George Hollifield, Sr., were jointly charged, in an indictment containing four substantive counts and a conspiracy count, with violating Title 18, U. S. C., §281 and conspiring to violate §281 and to defraud the United States within the meaning of Title 18, §371. Count 1 of the indictment in substance charged that Hollifield, an employee of the United States, agreed to receive $1750 as compensation from appellant for services to be rendered in relation to purchase requests in which the United States was directly interested, the services to consist of Hollifield's recommending the approval and procurement by the Air Force of the United States of certain types of sun goggles and ski goggles. Count 2 charged that on March 1, 1951, in Dayton, Ohio, Hollifield received from appellant as compensation for the rendition of such services $50. Count 3, a charge similar to Count 2, set forth the receipt by Hollifield from appellant of $250 on or about March 1, 1951, while Count 4 charged the receipt of $200 from appellant under similar circumstances on the 5th day of August, 1951. As to each of these counts it was charged that appellant aided, abetted, counseled, induced and procured the defendant Hollifield unlawfully to receive such compensation for the services rendered. Title 18, U. S. C., § 2.

Count 5 charged a conspiracy between Hollifield and appellant to cause Hollifield to perform such unlawful acts between October 1, 1950, and September 26, 1951. Thirteen overt acts were set forth, including the receipt of several sums of money by Hollifield from appellant.

A motion for severance was denied and the defendants were tried together. The jury found appellant guilty on all counts. The court sentenced him to imprisonment for two years on Count 1 and one year on

Count 4, the sentences to run consecutively, to pay fines of 500 on Counts 2 and 3, and to be imprisoned for a period of one year and a day on Count 5, the sentence on Count 5 to run concurrently with the sentences on Counts 1 and 4.

Hollifield was employed by the United States Air Force at Wright Field, Dayton, Ohio, being a designer supervisor (aviation clothing and equipage). In this position he worked under the general supervision of the Chief, Medical Specifications Branch, with opportunity for "wide use of creative initiative and independent judgment in planning and supervising the accomplishment of land survival equipment." His duty was to review and discuss first samples produced "to determine compliance with specifications." As project supervisor of survival kits, it was Hollifield's duty to pass upon the conformity to specifications of the various items in the kit, including goggles. Appellant had been acquainted with Hollifield for several months, having met him in October, 1950, and having seen him some 15 times during the period involved. A resident of Chicago and sub-contractor on various projects for the equipping or survival kits, appellant submitted to two prime contractors compasses and goggles for the kits. It was proved that certain goggles which had been supplied by appellant to a prime contractor had been recommended for rejection by the Chief, Physiology Branch Aero Medical Laboratory, on January 23, 1951, because of "marked deviations" from the applicable specifications. Hollifield as admitted by appellant, had discussed this matter with appellant. Shortly after the recommended rejection Hollifield secured a conference with Frederick Moss, a project engineer of the Physiology Branch, and other employees of the Air Force. Appellant attended this conference and in his presence Hollifield urged that the goggles be accepted. At the conference it was concluded that Hollifield should embody his reasons for recommending acceptance in a routing and record sheet and this was done. The routing and record sheet

stated: "Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information." While the routing and record sheet was signed by Randall W. Briggs, it bore the initials of Hollifield and, in asking for reconsideration, stated substantially the reasons Hollifield had advanced at the oral conference above described as to why the rejection of the goggles should be changed. Reconsideration was granted and the use of the substitute goggles submitted by appellant was recommended on February 3, 1951.

At the trial a written statement of appellant was introduced in which he admitted payment of $1,000 to Hollifield in April, 1951, and payment of $200 several weeks later. Hollifield telephoned long distance to appellant and flew to Chicago from Dayton on April 14, 1951. The two payments, totalling $1,200, appellant declared to an FBI agent, constituted a loan made because Hollifield told appellant on his visit that he was about to lose his home. Appellant said he had never seen Hollifield's home and that he did not know of his own knowledge that Hollifield had a home. He said that no interest was charged, that he obtained no security of any kind, that he had no receipt nor any record to evidence the loan. No promissory note was claimed to have been received.

Appellant contends that all of his statements, both oral and written, and several made by Hollifield which were received in evidence should have been stricken from the record upon the ground that there was no corroborative evidence to render admissible these statements claimed to be confessions. He also contends that the motion for acquittal should have been granted on the ground that there was no competent evidence of appellant's guilt. This is on the basis that, aside from

the written statement and oral declarations made by appellant, there was complete failure of proof.

These contentions were urged at great length before the distinguished and experienced trial judge who heard the case. We think the District Court was correct in overruling the motion to strike the statements and declarations. The several confessions and self-incriminating declarations of Hollifield were freely and voluntarily given and were entirely competent against Hollifield. *Wilson* v. *United States*, 162 U. S. 613, 623. The court admonished the jury repeatedly, clearly and forcefully not to consider the statements of Hollifield as binding upon the appellant and not to consider appellant's statements as binding upon Hollifield. He reiterated these admonitions in his charge. The statements and admissions made by appellant were also freely and voluntarily made. They relate not only to the conspiracy charge but to the substantive crimes charged in the indictment. Since the appellant's declarations were admitted, not against Hollifield but against himself, the question whether they were made in the course of carrying out the conspiracy has no bearing. Clearly appellant's statements were competent and relevant under his own indictment. *Perovich* v. *United States*, 205 U. S. 86, 91.

The written statement which appellant gave to the FBI agent after various conversations reads as follows:

> "I have been asked to submit a statement relating to my so called dealings with Robert Holafield.
>
> "In the winter of 1950, as best I can recall, I was at Dayton, Ohio, then visiting with the firm of Cappel & MacDonald & Company with whom I had numerous business transactions. At the office of this firm I met Mr. Holafield and in a discussion about things made for the armed forces, Mr. Holafield then stated that the next time I was in Dayton to visit him at Wright Field. Sometime

later I went to Wright Field and saw Mr. Holafield and had a social visit with him. We discussed no particular matters of any kind. Sometime later when I visited Mr. Holafield at Wright Field I discussed with him the possibility of making a wrist compass that was being required by the armed forces at well as using my ¾ inch compass in any future kit. While there I saw photographs of numerous items being used and some of the items seen by me I recognized as items that I furnished to prime-contractors.

"Sometime in the spring of 1951 I learned about an objection to a goggle and decided while in Dayton, Ohio visiting Cappel & MacDonald & Company to discuss the matter with Mr. Holafield. At that time Mr. Holafield stated that he did not know what objection was being made and that if I care to know specifically what that objection was to talk with someone in the optical department. Mr. Holafield and myself then went to the optical department and I tried to learn what specific objection was being made and was informed that there was some slight difference in the lense specification.

"I wish to be understood that at no time had I requested Mr. Holafield to do anything on my behalf. I was making no sale to the government as my sales were at all times confined to prime-contractors, who I understand obtain approvals.

"Sometime in the early part of 1951 Mr. Holafield had been in Chicago and our respective families visited socially. Sometime in April, as best I can recall, Mr. Holafield communicated with me and indicated that he was hard pressed financially and although I felt no moral or legal obligation to Mr. Holafield in any manner I indicated to him that if I could help him I would try to do so. When he visited Chicago he called upon me and stated that the reason for his financial distress was that he had to meet a mortgage on his home

> of approximately $1,200.00. Being mindful of the fact that I could help him financially and being charitable I gave Mr. Holafield $1,000.00 which he promised to repay when he was financially able to do so and a few weeks later gave him $200.00. I realize now the foolishness of my act but had no motive in so doing except in making him a loan."

This statement was freely and voluntarily made. Appellant contends in this court that it should be excluded upon the ground that confessions may not be admitted in evidence unless corroborated independently. But an exculpatory statement denying guilt is not a confession. Wigmore on Evidence, Vol. 3, § 821. The appellant did not confess guilt, he denied it. He did not admit that he participated in or aided and abetted Hollifield in violating the statute as charged in the indictment. Instead of acknowledging fault he asserted that the payments to Hollifield were a loan. Such statements are not confessions. *State* v. *Gilman*, 51 Me. 206, 225; *State* v. *Cadotte*, 17 Mont. 315; *State* v. *Novak*, 109 Ia., 717; *People* v. *Kristy*, 111 Cal. App. (2d) 695; *Bruner* v. *People*, 113 Col. 194; *People* v. *Porter*, 269 Mich. 284. Decisions upon the admissibility of confessions have no bearing upon the admissibility of appellant's statements and declarations not constituting confessions, which tended to show that an arrangement had been made between Hollifield and the appellant under which Hollifield was to be compensated by appellant in connection with Hollifield's official duty in procurement. The rendition of service by Hollifield to appellant was proved and the subsequent payment of money by appellant to Hollifield under unusual circumstances was admitted. The jury was entitled to consider appellant's statement admitting the payments, in the framework not only of its unusual conditions, but against the background of the reconsideration of the rejection of the sun goggles clearly shown to have been initiated by Hollifield in the presence of appel-

lant. However, as to Counts 2 and 3, which charged the receipt of the sums of $50 and $250, respectively, by Hollifield from appellant on or about March 1, 1951, there is no competent evidence supporting the receipt of these particular sums. Hollifield made a statement to this effect but, as the District Court correctly charged, this could not be considered as evidence against the appellant. The motion for acquittal on Counts 2 and 3 should have been granted.

The District Court correctly found that the verdict was unanimous. The juror Ramon J. Marker three times stated in open court that the verdict was his. Other questions raised by appellant present no reversible error. The judgment is reversed as to Counts 2 and 3 of the indictment and in all other respects is affirmed. The case is remanded to the District Court with instructions to dismiss Counts 2 and 3 of the indictment so far as they relate to the appellant and to correct appellant's sentence in conformity with this opinion.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

I, CARL W. REUSS, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *William J. Opper* v. *United States of America*, No. 11,711, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 30th day of March, A.D. 1954.

CARL W. REUSS,
Clerk of the United States Court of Appeals for the Sixth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 719

WILLIAM J. OPPER, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed June 7, 1954

The petition herein for for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, limited to questions 3, 4, and 5 presented by the petition for the writ which read as follows:

"3. Whether, where an admission is made to law enforcement officers after the date of the acts charged as crimes, it is to be so far treated as a confession that, in the absence of corroboration, it is inadmissible.

4. Whether a conviction can be sustained where there is, apart from an admissisen made to law enforcement officers after the date of the acts charged as crimes, no proof of the *corpus delicti*.

5. Whether, in convicting petitioner the jury, and in sustaining his conviction the court below, in fact admitted, as against him, statements of his co-defendant which, as a matter of law, were not competent evidence against him."

The case is assigned for argument immediately following No. 726.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Vol. III

TRANSCRIPT OF RECORD

(Exhibits—Pages 1 to 123)

Supreme Court of the United States

OCTOBER TERM, 1954

No. 49

WILLIAM J. OPPER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1954

CERTIORARI GRANTED JUNE 7, 1954

INDEX

GOVERNMENT'S EXHIBITS

Exh. No.	Description	Vol. III Pages
2.	Extracts (Pages 1, 2 and 5) of Purchase Request No. 127196-C reciting quantity, price and specifications for type B-1 Kits (Ski goggles) referred to in Counts 2 and 3 of indictment	2, 3, 4
3.	Extracts (Pages 1, 2 and 6 of Purchase Request No. 133709 reciting quantity, price and specifications for type C-1 Kits (Ski goggles) referred to in Counts 2 and 3 of indictment	5, 6, 7
4.	Extracts (Pages 1, 2 and 5) of Purchase Request No. 133766-C reciting quantity, price and specifications for type D-1 Kits (sun goggles) referred to in Counts 2 and 3 of indictment	8, 9, 10
5.	Extracts (Pages 1, 2 and 5) of Purchase Request No. 119443 reciting quantity, price and specifications for type D-1 Kits (sun goggles) referred to in Count 1 of indictment	11, 12, 13
6.	Extracts (pages 1 and 8) of Purchase Request No. 119432 reciting quantity, price and specifications for type E-1 Kits (Ski goggles) referred to in Count 1 of indictment	14, 15, 16
7.	Extracts (pages 1 and 5) of Purchase Request No. 119450 reciting quantity, price and specifications for type E-1 Kits (Ski goggles) referred to in Count 1 of indictment	17, 18, 19
8.	Extracts (pages 1, 2 and 10 of Contract No. AF 33(038)17438 with S. Buchsbaum & Co., reciting quantity, price and specifications for type D-1 Kits (sun goggles) referred to in Counts 1, 2, 3 and 4 of indictment	20-25

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Government's Exhibits—(Continued)

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Defendant's Exhibits—(Continued)

Exh. No.	Description
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U.	Work Order, dated January 24, 1951, relating to testing lenses of ski goggles with respect to specification No. JAN-G-1134
V	Materials Laboratory test report, dated March 15, 1951, relating to ski goggles

GOVERNMENT'S EXHIBIT No. 2

(Page One)

HQAMC FORM NO. 258

PURCHASE REQUEST No. 127196-C

"PUBLIC EXIGENCY"

Submitted by: Procg Div, Hq AMC Date of Initiation: 2 January 1951

Section 1.

ITEM	QUANTITY	UNIT	ESTIMATED UNIT PRICE	DESCRIPTION OF ARTICLES OR SERVICE TO BE PURCHASED	UNIT PRICE	ACTUAL TOTAL PRICE
1	13,000	EA	100.00	Kit, Emergency Sustenance, Cold Climate, Seat Style , Type B-1, Spec. ~~MIL-S-6225~~ ~~dtd 10 August 1950~~ dtd 24 Jan. 51 and S/N ~~1950-55 thru 1950-57~~ Exhibit MCREXD5-48 dtd 28 Aug 50 See Item 3-4	Item 1	RECORDED BY MCMSX62 Exhibit MCREXD5-48 dtd 28 August 50
2	3000		130,000.	Component Spare Parts, 10% money Value of (Items to be Selected at a Later Date)		
				See Exhibit "B" for Public Exigency Purchase Request No. 127196 to appear on all contracts. Exhibit MCREXD5-43 dtd 28 August 50		
				See Exhibit "C" for Certification		

MAINT DATA REQMTS UNIT - WRIGHT FIELD 4/4/51 PROCESSED BY: Not Data Required

TOTAL ESTIMATED COST	BP. ORD. NO.	ITEM NUMBER	PROP CLASS	TOTAL ACTUAL COST
$ 1,430,000.00	FY 1951 PROJECT NO. 422.20		~~N/C~~ 20B	$ ~~1,430,000.00~~ 1,170,136.00

Section 2.

DELIVER TO: Item 1-8000 ea to AF 903 CSD, OOAdA - 5000 ea to AF 906 CSD, Hamilton AFB "For AF account"

DESIRED DELIVERY SCHEDULE—MAXIMUM ACCEPTABLE EXTENSION OF DESIRED DELIVERY SCHEDULE.....MONTHS

JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
1	1				2000	2000	2000	2000	2000	3000	

F. O. B. POINT: Contractor's Plant POINT OF INSPECTION: Contractor's Plant

Section 3.

REMARKS: (Reference Subject by number in space below and list all exhibits and attachments)

1. Recommended Source: X 2. Sole Source: 3. Should Serial Number Be Assigned: 4. G. F. P.: 5. Tools, patterns, etc. to be issued by Govt.:

Coordinated - Eng. Stds. Sect. Date 2-5-51 By MCREXU62

This Purchase Authority is considered complete at Total Actual Cost Shown Hereon $ ~~1,430,000.00~~ 1,170,136.00 By [illegible] Date 8/17 Budget and Fiscal Division

1. No restrictions as to source

7. Request clause be inserted in contract that quantities of supplies or equipment called for herein may be increased by 50%.

See Exhibit "A" for list of items to be furnished by contractor. Items will be Government Furnished.

Item 4.

NOTICE: Upon due inquiry made it was found that the articles enumerated hereon could not be procured from any source or branch of The Government without transfer of funds, or the immediate need of these supplies or the unreasonable delay in the delivery of this Station from point of supply precludes their purchase from any other branch of the Government.

APPROVED BY: ROBERT I. FLETCHER, Col, USAF SYMBOL MCSXG DATE

APPROVED BY: JAMES F. EARLY, Brig Gen, USAF SYMBOL MCS DATE

INITIATED BY: E. J. GAFFNEY PHONE 68322 SYMBOL MCSXC41

APPROVED BY: W. L. SCHULTZ, Captain, USAF SYMBOL MCSXC4 DATE

APPROVED BY: SYMBOL DATE

APPROVAL OF FUNDS: The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to, allotment(s):

5774400 163-5000 P422.20-01 S33.038

The available balance of which is sufficient to cover the cost in the amount set to exceed $ 1,430,000.00

This Purchase Authority is considered complete at Total Actual Cost Shown Hereon $ [illegible] By [illegible] Budget and Fiscal Division

BUDGET AND FISCAL OFFICER DATE

BUDGET AND FISCAL OFFICER DATE

Section 5.

VENDOR'S NAME AND ADDRESS

NOT ON UNAPPROVED LIST Initial and date

CONTRACT NUMBER

GOVERNMENT'S EXHIBIT No. 3

(Page One)

Addressed to: Proc Div, Hq AMC — PURCHASE REQUEST — Date of Initiation: 30 Dec 50 — No. 133709 — "PUBLIC EXIGENCY"

Section 1.

ITEM	QUANTITY	UNIT	ESTIMATED UNIT PRICE	DESCRIPTION OF SUPPLIES OR SERVICE TO BE PURCHASED	UNIT PRICE	ACTUAL TOTAL PRICE
12	10,000	EA	100.00	Kit, Emergency Sustenance, Temperate Climate, Seat Style, Type C-1, Spec. MIL-S-6227 dtd [illegible] 1950 S/N [illegible] 61 Pkgs Composite [illegible] 9 add Other Dash, Stock 613		
				Purchase Request No. 133709 to appear on all contracts.		
				See Exhibit "B" for Public Exigency		
				See Exhibit "C" for Certification.		

MAINT DATA REQMTS UNIT - WRIGHT FIELD PROCESSED BY [illegible]

RECORDED BY MCMSXR2

TOTAL ESTIMATED COST: $ 1,000,000.00 — BY. ORD. NO. FY 1951 — PROJECT NO. 422.20 — ITEM NUMBER — PROP. CLASS — TOTAL ACTUAL COST $ [illegible]

Section 2.

Delivery: 6000 ea to AF-903-CSD, OOAMA • - 4000 ea to AF-906-CSD, Orlando - Mark "For AF account

DESIRED DELIVERY SCHEDULE—MAXIMUM ACCEPTABLE EXTENSION OF DESIRED DELIVERY SCHEDULE ..... MONTHS

JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
1951 1	1951 1				2000	2000	2000	2000	2000		

F. O. B. POINT: Contractor's Plant — POINT OF INSPECTION: Contractor's Plant

Section 3.

REMARKS: (Reference Subject by number in space below and list all exhibits and attachments)

1. Recommended Source: X
2. Sole Source:
3. Should Serial Number Be Assigned:
4. G. F. P.:
5. Tools, patterns, etc. to be loaned by Gov't.:

Coordinated - Eng. Stds. Spec. X — Date 2-2-51 By MCREXU62

1. No restrictions as to sources.

7. Request clause be inserted in contract that quantities of supplies and/or equipment called for herein may be increased by 50%.

See Exhibit "A" for list of items to be furnished by contractor; all other items will be Government Furnished.

Section 4.

CERTIFICATION. Upon due inquiry made it was found that the articles enumerated hereon could not be procured from any other branch of The Government without transfer of funds, or the immediate need of these supplies or the maintenance of this Station from point of supply precludes their purchase from any other branch of the Government.

APPROVED BY: (A) [illegible] Major USAF
ROBERT I. FLETCHER, Col., USAF
SYMBOL MCMSXC DATE

APPROVED BY: (B) [illegible] Brig Gen USAF
JAMES F. EARLY, Brig.Gen., USAF
SYMBOL MCMS DATE

INITIATED BY: E. J. Gaffney
E. J. GAFFNEY
68322 SYMBOL MCLSXC41

APPROVED BY: (C) [illegible]
SCHULTZ, Captain, USAF
SYMBOL MCLSXC4 DATE

APPROVED BY: (D) [illegible] 2/5/51
SYMBOL DATE

I. OF FUNDS. The supplies and services to be obtained by this instrument are authorized by law for the purpose set forth [illegible]

5714400 163.5000 P (22(20) -06 930-930

This Purchase Authority is considered complete at Total Actual Cost shown Hereon

Funds balance of which is sufficient the cost in an amount not to exceed: $ 4,000,500.00

Actual cost approved at: $ 560,940.00

[illegible] Colonel, USAF
BUDGET AND FISCAL OFFICER DATE

BUDGET AND FISCAL OFFICER DATE

By [illegible] Date
Budget and Fiscal Division
INITIATING ACTIVITY 1951

Section 5.

VENDOR'S NAME AND ADDRESS — NOT ON UNAPPROVED REQ (Initial and date) — CONTRACT NUMBER

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, vs. ROBERT GEORGE HOLLIFIELD, SR., WILLIAM P. OPPER, *Defendants*.	Case No. 2669, Criminal

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(Filed in U. S. Circuit Court of Appeals, Sixth Circuit, September 16, 1952)

I hereby certify that the within exhibits, being Plaintiff's Exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28-a, 28-b, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 and 51 and Defendants' Exhibits Nos. A, A-1, A-2, B, C, D, D-1, G, U, V, CC and EE, are the exhibits introducted in the above entitled case.

V. ELIZABETH FISCHER,
Official Court Reporter,
U. S. District Court, SDO.

9-9-52

Government's Exhibit No. 2

(Page Two)

EXHIBIT "A" TO PURCHASE REQUEST-127196

The following items are to be Contractor Furnished under SPECIFICATION MIL-S-6226A(USAF):

ITEM	DESCRIPTION
2	Boot, Mukluk, Man's Survival Kit, Spec. MIL-B-6260
3	Candle, Wax, Plumber's Type, 1¼" dia by 5¼" long
4	Compass, Wrist, Non-liquid, Type L-1, Spec. 21051
5	Container, Water, USAF Dwg 4509049
6	Container Assembly, Parachute Bailout, Seat Style, Emergency Survival, USAF Dwg 48F3865
8	Glove, Flying, Very Light, Mosquito Resistant, Type K-1 Spec. 3261
9	Glove, Shells, Leather M-1949, Size 5, Spec. MIL-G-822
10	Glove, Inserts, Wool, M-1949, Size 5, Spec. MIL-G-835
11	Gloves, Flying, Inner, Intermediate, Nylon, Size Large, Spec. N-G-26
12	Goggles, Ski, Mountain, Type 1, Spec. MIL-G-1134
13	Headnet, Mosquito, M-1944, Spec. PQD458
14	Insect Repellent, 4 oz., Can body dimensions 3-29/32", USAF Dwg 45B9008
15	Jackknife, Utility, Spec. MIL-J-818
17	Mirror, Emergency Signalling, Type B-1
19	Ointment, Sun Protective
21	Saw-knife-Shovel Assembly, Ice and Snow, Detachable Handle, Type A-2, USAF Dwg 50D3945
22	Socks, Wool, Winter, Size 12, Spec. JAN-S-405
23	Socks, Wool, Cushion Sole, Size 12, Spec. JAN-S-48
24	Stove, Sterno
25	Tissue, Pocket Fold—Regular size, 24 tissues per pack, size 8.75 by 9.75

Government's Exhibit No. 2

(Page Five)

PROCUREMENT DATA LIST

Subject: Purchase Request No.: 127196

MCPPXS-21 MCREXU62 Date: 2-5-51

The following data are necessary to the subject procurement:

AF Bulletin No. 23 dated 1-12-51
Numerical List AF and AN Standard Drawings

Specifications:
MIL-B-6260A dtd 3 January 51
21051-A dtd Jan 49, Am 4 dtd 25 Jan 51
3261A dtd 16 June 47
MIL-G-822A dtd 22 Dec 49
MIL-G-835 dtd 28 July 49
AN-G-26 dtd 8 Sept 48
JAN-G-1134 dtd 24 June 49
PQD 458 dtd 31 Aug 44
MIL-J-818 dtd 29 July 49
41063 dtd 4 Mar 46
JAN-S-405 dtd 30 Sept 46, Am 3 dtd 23 May 49
JAN-S-48A dtd 21 June 46
MIL-S-6226A dtd 24 Jan 51
AN Drawing—AN6574 dtd 29 Sept 48

USAF Drawings:
4509049 and details on D/L
48F3865 and details on D/L
4509049 and details on D/L
48F3865 and details on D/L
45B9008
50D3945 and details on D/L
48D3862
45D18951
51F3766
45H18762

Exhibits:
MCREXD5-45 dtd 30 Aug 50
MCREXD5-43 dtd 28 Aug 50

Government's Exhibit No. 3

(Page Two)

EXHIBIT "A" TO PURCHASE REQUEST 133709

The following items are to be Contractor Furnished under SPECIFICATION MIL-S-6227A(USAF):

ITEMS	DESCRIPTION
2	Candle, Wax, Plumber's Type, 1¼" dia by 5¼" long
3	Compass, Wrist, Non-liquid, Type 1-1
4	Container, Water, USAF Dwg 45G9049
5	Container Assembly—Parachute Bailout, Seat Style, Emergency Survival, USAF Dwg 48F3865
6	Fishing Kit, Survival, Spec. MIL-F-6218
8	Glove, Shells, Leather M-1949, Size 5, Spec. MIL-G-822
9	Glove, Inserts, Wool, M1949, Size 5, Spec. MIL-G-835
10	Goggles, Ski, Mountain, Type 1, Spec. MIL-G-1134
11	Jackknife, Utility, Spec. MIL-J-818
13	Mirror, Emergency Signalling, Type B-1, Spec 41063
16	Socks, Wool, Cushion Sole, Size 12, Spec. JAN-S-48
17	Stove Sterno
18	Tissue, Pocket Fold-regular size, 24 tissues per pack, size 8.75 by 9.75 inches

Government's Exhibit No. 3
(Page Six)

PROCUREMENT DATA LIST

Subject: Purchase Request No. 133709-C

MCPPXS-21 MCREXU62 Date: 2 Feb. 51

The following data are necessary to the subject procurement:

AF Bulletin No. 23 dated 12 Feb. 51
Numerical List AF and AN Standard Drawings

Specs.

MIL-S-6227A, dated 24 Jan. 51

21051-A, dated 14 Jan. 49, and Am. No. 4, dated 25 Jan. 51

MIL-F-6218, dated 4 August 50

MIL-G-822A, dated 22 Dec. 49

MIL-G-835, dated 28 July 49

JAN-G-1134, dated 24 June 49

MIL-J-818, dated 29 July 49

41063, dated 4 March 46

JAN-S-48A dated 21 June 46

3229, dated 30 June 44

USAF Dwgs.

48F3865 and details on D/L

45G9049 and details on D/L

48D3869

44A9159

44A9162

Exhibits

MCREXDS-45, dated 30 August 50

Prepared by: MK/jh

GOVERNMENT'S EXHIBIT No. 6

(Page One)

HQAMC FORM NO. (31 Sep 48) 25B

PURCHASE REQUEST

Submitted to: Proc. Div., Hq. AMC

Date of Initiation: 31 July 50

No 119432

Section 1

ITEM	QUANTITY	UNIT	ESTIMATED UNIT PRICE	DESCRIPTION OF SUPPLIES OR SERVICE TO BE PURCHASED	UNIT PRICE	ACTUAL TOTAL PRICE
1	10,000	ea.	$142.25	Sustenance Kit - Individual Long Range Spec MIL-S-6213 (USAF), Type No. and Spec. date to be furnished by [redacted] S/N 8330-858840 dtd 24 August 50		

SEE THE BUYERS INFORMATION COPY OF THIS P. R. FOR ENG. STDS. COORDINATION, ARCREX 3-42

Justification: This procurement has been directed by Hq. USAF to meet special Strategic Air Command requirements.

Purchase Request No. 119432 to appear on all contracts

Classified by [redacted] Colonel USAF Chief, Supply Div.

TOTAL ESTIMATED COST	EXP. ORD. NO.	PROP. CLASS	TOTAL ACTUAL COST
$1,422,500.00	FY 1951 PROJECT NO. 421,20	13-C	$2,262,406.00

Section 2.

DELIVER TO: Shipping information to be furnished by [redacted] Released to Budget

DESIRED DELIVERY SCHEDULE—MAXIMUM ACCEPTABLE EXTENSION OF DESIRED DELIVERY SCHEDULE

JAN FEB MAR APR MAY JUNE JULY AUG SEPT OCT NOV DEC

194 194 Start in 60 days and complete within 120 days.

F. O. B. POINT Contractor's plant POINT OF INSPECTION Contractor's plant

Section 3. EMERGENCY PROCUREMENT See Exhibit "A"

MAIR DATA REQMTS WRIGHT FIELD PROCESSED BY: No Data Required

REMARKS: (Reference Subject by number in space below and list all exhibits and attachments)
1. Recommended Source X 2. Sole Source 3. Should Serial Number Be Assigned [illegible] 4. A. G. F. P. 5. Transmit [illegible] 7. General Remarks X

1. No restrictions as to sources.
2. All items to be contractor furnished material except for the Rifle (Cal .30) and ammunition which will be Government Furnished Materials.
7. Request clause be inserted in contract that "quantities of supplies and/or equipment called for herein may be increased by 50% without further negotiation".

Section 4.

INITIATION: Upon due inquiry made it was found that the articles enumerated hereon could not be procured from any other branch of The Government without transfer of funds, or the immediate need of these supplies or the remoteness of this Station from point of supply precludes their purchase from any other branch of the Government.

APPROVED BY: LESTER W. LIGHT, Colonel, USAF (A) SYMBOL MCMSXE DATE July 50

APPROVED BY: JAMES F. [illegible], Brigadier General, USAF SYMBOL MCMS DATE July 50

INITIATED BY: J. D. Tucker PHONE 5m7267 SYMBOL MCMSXE2

APPROVED BY: H. P. WHEATON, Jr., Major, USAF (C) SYMBOL MCMSXE DATE July 50

APPROVED BY: (D) SYMBOL DATE

APPROVAL OF FUNDS: The supplies and services to be obtained by this instrument are authorized by, and for the purpose set forth in, and are chargeable to, allotment(s):

5714400 163-5000 1421(20)-08 533-036

The available balance of which is sufficient to cover the cost in an amount not to exceed $1,422,500.00

Actual cost approved for $2,262,406.00

EDWARD B. GALLANT, Colonel, USAF (E) BUDGET AND FISCAL OFFICER DATE

Frank J. Boland (F) BUDGET AND FISCAL OFFICER DATE

JAMES F. EARLY, Brig. General, USAF (G) INITIATING ACTIVITY 10/24/50 DATE

Section 5.

VENDOR'S NAME AND ADDRESS

NOT ON UNAPPROVED LIST (Initial and date)

CONTRACT NUMBER

PURCHASE ORDER

GOVERNMENT'S EXHIBIT No. 4

(Page One)

HQAMC AFSPA No. 238

PURCHASE REQUEST X

No 133766

"PUBLIC EXIGENCY"

Subscribed by: Proc Div, Hq AMC Date of Initiation: 6 Jan 51

Section 1.

ITEM	QUANTITY	UNIT	ESTIMATED UNIT PRICE	DESCRIPTION OF SUPPLIES OR SERVICE TO BE PURCHASED	UNIT PRICE	TOTAL PRICE
1	8,500	EA	$165.80	Kit, Emergency Sustenance, Aircraft, Type D-1, Spec. MIL-S-5775A dtd 28 Aug 50 S/N 8330-559219		

This Purchase Authority considered complete at Total Actual Cost Shown Hereon $621,323.50 Date 6/1/51 Fiscal Division

Coordinated - Eng. Stds. Sect. Date 1-16-51 By [illegible] BMCMSXU62

AA #1 dtd 12 Jan 51

Request No. 133766 to appear on all contracts

T.I. 2022-94

See Attachment "1" for Public Exigency

See Attachment "2" for Certification

RECORDED BY [illegible] WCMSXR2

DATA REQUIRED BY: P AFB NO DATA REQUIRED

Date 1/16/51 Process by —

TOTAL ESTIMATED COST	EXP. ORD. NO. / PROJECT NO.	ITEM NUMBER	PROP. CLASS	TOTAL ACTUAL COST
$ 1,402,500.00	FY 1951 / 422.20		13C	$ 621,323.50

Section 2.

DELIVER TO: 4,500 to AF 903 CSD, [illegible] - 4,000 to AF 906 CSD, MAMA - Mark "For AF Account"

DESIRED DELIVERY SCHEDULE—MAXIMUM ACCEPTABLE EXTENSION OF DESIRED DELIVERY SCHEDULE ..... MONTHS

JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
1951 1	1951 1				2000	2000	2000	2500			

F. O. B. POINT: Contractor's Plant POINT OF INSPECTION: Contractor's Plant

Section 3.

REMARKS: (Reference Subject by number in space below and list all exhibits and attachments)

1. Recommended Source X
2. Sole Source
3. Should Serial Number Be Assigned
4. G. F. P.
5. Tools, patterns, etc. to be loaned by Gov't.
6. Authority
7. General Remarks X

1. No restrictions as to source.
7. The Government desires to incorporate in the contract document or purchase request a clause whereby the option be included to authorize and increase up to 50% on all contracts.

   See Exhibit "A" for list of items to be furnished by contractor; all other items will be Government Furnished.

Section 4.

INITIATION: Upon due inquiry made it was found that the articles enumerated hereon could not be procured from any other branch of The Government without transfer of funds, or the immediate need of these supplies or the remoteness of this Station from point of supply precludes their purchase from any other branch of the Government.

APPROVED BY: (A) ROBERT I. FLETCHER, Col, USAF — SYMBOL [illegible] DATE 6 Jan 51

APPROVED BY: (B) James F. EARLY, Brig.Gen., USAF — SYMBOL [illegible] DATE 6 Jan 51

INITIATED BY: E. A. Gaffney — E. A. GAFFNEY — PHONE 68322 SYMBOL [illegible]

APPROVED BY: (C) C. L. SCHULTZ, Captain, USAF — SYMBOL [illegible] DATE [illegible]

APPROVED BY: (D) — SYMBOL — DATE 2/21/51

APPROVAL OF FUNDS: The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to, allotment(s).

Allotment 422 (20)-00

The available balance of which is sufficient to cover the cost in an amount not to exceed $1,402,500.00

Actual cost approved for $.....

(E) Edward B. Farrell, Colonel, USAF — BUDGET AND FISCAL OFFICER — DATE 12 Jan 51

(F) BUDGET AND FISCAL OFFICER — DATE

(G) INITIATING ACTIVITY — DATE

Section 5.

VENDOR'S NAME AND ADDRESS

NOT ON UNAPPROVED LIST (Initial and date)

CONTRACT NUMBER

Total Actual Cost Shown Hereon $621,323.50 Date 6/1/51 Fiscal Division

Coordinated - Eng. Stds. Sect. Date 1-16-51 By [illegible] BMCMSXU62

Request No. 133766 to appear on all contracts

T.I. 2022-94

See Attachment "1" for Public Exigency

See Attachment "2" for Certification

RECORDED BY [illegible] WCMSXR2

DATA REQUIRED BY: P AFB NO DATA REQUIRED

Date 1/16/51 Process by —

TOTAL ESTIMATED COST $ 1,402,500.00 | EXP. ORD. NO. / PROJECT NO. FY 1951 / 422.20 | ITEM NUMBER | PROP. CLASS 13C | TOTAL ACTUAL COST $ 621,323.50

Section 2.

DELIVER TO: 4,500 to AF 903 CSD, [illegible] - 4,000 to AF 906 CSD, MAMA - Mark "For AF Account"

DESIRED DELIVERY SCHEDULE—MAXIMUM ACCEPTABLE EXTENSION OF DESIRED DELIVERY SCHEDULE ..... MONTHS

JAN 1951 1 | FEB 1951 1 | MAR | APR | MAY | JUNE 2000 | JULY 2000 | AUG 2000 | SEPT 2500 | OCT | NOV | DEC

F. O. B. POINT: Contractor's Plant POINT OF INSPECTION: Contractor's Plant

Section 3.

REMARKS: (Reference Subject by number in space below and list all exhibits and attachments)

1. Recommended Source X
2. Sole Source
3. Should Serial Number Be Assigned
4. G. F. P.
5. Tools, patterns, etc. to be loaned by Gov't.
6. Authority
7. General Remarks X

1. No restrictions as to source.
7. The Government desires to incorporate in the contract document or purchase request a clause whereby the option be included to authorize and increase up to 50% on all contracts.

   See Exhibit "A" for list of items to be furnished by contractor; all other items will be Government Furnished.

Section 4.

INITIATION: Upon due inquiry made it was found that the articles enumerated hereon could not be procured from any other branch of The Government without transfer of funds, or the immediate need of these supplies or the remoteness of this Station from point of supply precludes their purchase from any other branch of the Government.

APPROVED BY: (A) ROBERT I. FLETCHER, Col, USAF — SYMBOL [illegible] DATE 6 Jan 51

APPROVED BY: (B) James F. EARLY, Brig.Gen., USAF — SYMBOL [illegible] DATE 6 Jan 51

INITIATED BY: E. A. Gaffney — E. A. GAFFNEY — PHONE 68322 SYMBOL [illegible]

APPROVED BY: (C) C. L. SCHULTZ, Captain, USAF — SYMBOL [illegible] DATE [illegible]

APPROVED BY: (D) — SYMBOL — DATE 2/21/51

APPROVAL OF FUNDS: The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to, allotment(s).

Allotment 422 (20)-00

The available balance of which is sufficient to cover the cost in an amount not to exceed $1,402,500.00

Actual cost approved for $.....

(E) Edward B. Farrell, Colonel, USAF — BUDGET AND FISCAL OFFICER — DATE 12 Jan 51

(F) BUDGET AND FISCAL OFFICER — DATE

(G) INITIATING ACTIVITY — DATE

Section 5.

VENDOR'S NAME AND ADDRESS

NOT ON UNAPPROVED LIST (Initial and date)

CONTRACT NUMBER

Government's Exhibit No. 1
(Page Two)

EXHIBIT "A" to 133766-C

The following items are to be contractor furnished:

AN-S-577SA

ITEM NO.	DESCRIPTION
2	Can , Insect Repellent
3	Candle, Wax (1½ inches diameter by 5 inches long
4	Compass, Wrist, Non-Liquid, Type I-1
5	Container, Water, 5-Quart Capacity, Part No. 46G3007-1
7	Cup, Corrosion Resisting, 10 Ounce Capacity, Nesting
8	Double-Edge Blades
9	File, Flat, Smooth, 6-Inch
10	Glove, Flying, Very Light, Mosquito Resistant
11	Goggles, Sun, Type I
13	Hat, Reversible, Sun
14	Headnet, Mosquito, A-1944
15	Jackknife, Utility
17	Kit, Fishing Survival, Spec MIL-F-6218
18	Machete, Folding
21	Mirror, Emergency Signalling, Type I-1
22	Ointment, Sun Protective, Eli Lilly Preparation No. 67, 120 Gram Tube
24	Poncho, Lightweight, U. S.
25	Razor, Safety, Gillette Type

Request No. 133766

Government's Exhibit No. 4

(Page Five)

PROCUREMENT DATA LIST

Subject: Purchase Request No. 133766

MCPPXS-21 MCREXU62 Date: 14 Feb. 51

The following data are necessary to the subject procurement:

AF Bulletin No. 28 dated 12 Feb 51
Numerical List AF and AN Standard Drawings

SPECS

MIL-S-5775A dtd 28 Aug 50, Am No. 1 dtd 13 Feb 51
QQ-W321B dtd 30 June 50
JAN-F-284 dtd 12-5-45
JAN-S-48A dtd 21 June 46
22-275 dtd 8 April 48, Am No. 2 dtd 20 Oct 48
MIL-P-3003A dtd 23 Sept 49
41063 dtd 4 March 46
MIL-F-6218 dtd 4 August 50
MIL J-818 dtd 29 July 49
PQD458 dtd 31 August 44
MIL-G-4085 dtd 21 March 50
3261A dtd 16 June 47
21051A dtd 7 April 50, Am No. 5 dtd 25 Jan 51

USAF Dwgs

44A9159
44A9162
45D18951
45B9008
46G3007 and details on D/L
46D3065
44G5062
48G3639 and details on D/L

Prepared by: MK:blh

GOVERNMENT'S EXHIBIT No. 5

(Page One)

HoAMC [illegible] 258 Procurement Div. **PURCHASE REQUEST** **No. 119443**

Submitted to: Hq. AMC Date of Initiation: 17 August 1950

Section 1.

ITEM	QUANTITY	UNIT	ESTIMATED UNIT PRICE	DESCRIPTION OF SUPPLIES OR SERVICE TO BE PURCHASED	UNIT PRICE	ACTUAL TOTAL PRICE
1	5,000	ea.	145.00	Kit - Emergency Sustenance Aircraft Basic Type D-1 Spec. MIL-S-5775A ~~date to be furnished by [illegible]~~ dtd 28 August 50 S/N 8330-559219		
	Coordinated - Eng. Sec. Date 8-29-50 By MCREXU62					

JUSTIFICATION: This Purchase Request is being initiated to secure additional Type D-1 emergency Sustenance Kits to fill known shortages in present stock resulting from obligations to overriding S-1 priorities and to meet anticipated requirements.

2,500 Kits to be applied on	Project HOLD-OFF	$362,500.00	
2,500 Kits to be applied on	normal procurement	$362,500.00	

Purchase Request No. 119443 to appear on all contracts.

TOTAL ESTIMATED COST	EXP. ORD. NO.	ITEM NUMBER	PROP. CLASS	TOTAL ITEM COST
$725,000.00	FY 1951		13C	
	PROJECT NO. 422.20			

Section 2.

DELIVER TO: ~~2000~~ to MAALA (M/F: Cl. 13C Stock); ~~3000~~ to OAMA (M/F: Cl. 13C Stock)

DESIRED DELIVERY SCHEDULE—MAXIMUM ACCEPTABLE EXPENSION OF DESIRED DELIVERY SCHEDULE ____ MONTHS

JAN 1000 FEB 1000 MAR 1000 APR 1000 MAY JUNE JULY AUG SEPT DEC

F.O.B. POINT Contractor's Plant POINT OF INSPECTION Contractor's Plant

Section 3.

REMARKS: (Reference Subject by number in space below and list all exhibits and attachments)
1. Recommended Source 2. Sole Source 3. Should Serial Number Be Assigned 4. G. F. P. 5. Tools, patterns, etc. to be loaned by Gov't. 6. Authority 7. General Remarks

7. Request clause be inserted in contract that quantities of supplies and/or equipment called for herein may be increased by 50% without further negotiations.

7. The following items listed in Spec. MIL-S-5775A are to be C.F.E. ~~[illegible]~~ 4, 7, 10, 9, 13, 2, 15, 17, 26, 27, 32, 33, 11, 23, 31, 29, 6.

DATA REQUIRED

Date 8/24/50 Process by MO

Section 4.

INITIATION: Upon due inquiry made it was found that the articles enumerated hereon could not be procured from any other branch of The Government without transfer of funds, or the immediate need of these supplies or the remoteness of this Station from point of supply precludes their purchase from any other branch of the Government.

(A) APPROVED BY: ROBERT I. FLETCHER, Colonel, USAF, SYMBOL MCMSXC, DATE 18 Aug 1950

(B) APPROVED BY: JAMES P. EAPLY, Brigadier General, USAF, SYMBOL MCMS, DATE 18 Aug 1950

INITIATED BY: J. D. TUCKER, PHONE 5-7257, SYMBOL MCMSXC

(C) APPROVED BY: H. P. WHEATON, Jr., Major, USAF, SYMBOL MCMSXC, DATE 18 Aug 1950

(D) APPROVED BY: SYMBOL DATE 9/12

APPROVAL OF FUNDS: The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to, allotment(s)

5714400 165 5000 P 422(20)-08 S33-038

The available balance of which is sufficient to cover the cost in an amount not to exceed $725,000.00

(E) EDWARD B. GALLANT, Colonel, USAF

BUDGET AND FISCAL OFFICER DATE

(F) Actual cost approved for $.....

BUDGET AND FISCAL OFFICER DATE

(G) INITIATING ACTIVITY DATE

Section 5.

VENDOR'S NAME AND ADDRESS

NOT ON UNAPPROVED LIST (initial and date)

CONTRACT NUMBER

This Purchase Request considered Complete Total Actual Cost By OCJ Budget and Fiscal Division Date

1951

2,500 Kits to be applied on Project HOLD-OFF $362,500.00
2,500 Kits to be applied on normal procurement $362,500.00
Purchase Request No. 119443 to appear on all contracts.
TOTAL ESTIMATED COST $725,000.00 EXP. ORD. NO. FY 1951 PROJECT NO. 422.20 ITEM NUMBER PROP. CLASS 13C
DELIVER TO: ~~2000~~ to MAALA (M/F: Cl. 13C Stock); ~~3000~~ to OAMA (M/F: Cl. 13C Stock)
DESIRED DELIVERY SCHEDULE—MAXIMUM ACCEPTABLE EXPENSION OF DESIRED DELIVERY SCHEDULE
JAN 1000 FEB 1000 MAR 1000 APR 1000 MAY JUNE JULY AUG SEPT DEC
F.O.B. POINT Contractor's Plant POINT OF INSPECTION Contractor's Plant
7. Request clause be inserted in contract that quantities of supplies and/or equipment called for herein may be increased by 50% without further negotiations.
7. The following items listed in Spec. MIL-S-5775A are to be C.F.E. ~~[illegible]~~ 4, 7, 10, 9, 13, 2, 15, 17, 26, 27, 32, 33, 11, 23, 31, 29, 6.
DATA REQUIRED
Date 8/24/50 Process by MO
INITIATION: Upon due inquiry made it was found that the articles enumerated hereon could not be procured from any other branch of The Government without transfer of funds, or the immediate need of these supplies or the remoteness of this Station from point of supply precludes their purchase from any other branch of the Government.
(A) APPROVED BY: ROBERT I. FLETCHER, Colonel, USAF, SYMBOL MCMSXC, DATE 18 Aug 1950
(B) APPROVED BY: JAMES P. EAPLY, Brigadier General, USAF, SYMBOL MCMS, DATE 18 Aug 1950
INITIATED BY: J. D. TUCKER, PHONE 5-7257, SYMBOL MCMSXC
(C) APPROVED BY: H. P. WHEATON, Jr., Major, USAF, SYMBOL MCMSXC, DATE 18 Aug 1950
(D) APPROVED BY: SYMBOL DATE 9/12
APPROVAL OF FUNDS: The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to, allotment(s)
5714400 165 5000 P 422(20)-08 S33-038
The available balance of which is sufficient to cover the cost in an amount not to exceed $725,000.00
(E) EDWARD B. GALLANT, Colonel, USAF
BUDGET AND FISCAL OFFICER DATE
(F) Actual cost approved for $.....
BUDGET AND FISCAL OFFICER DATE
(G) INITIATING ACTIVITY DATE
VENDOR'S NAME AND ADDRESS
NOT ON UNAPPROVED LIST (initial and date)
CONTRACT NUMBER
This Purchase Request considered Complete Total Actual Cost By OCJ Budget and Fiscal Division Date
1951

Government's Exhibit No. 3

(Page Two)

UN-PRICED EXHIBIT - 119443

ITEM	QUANTITY	UNIT	NOMENCLATURE	UNIT COST	TOTAL COST
1	5,000 2,500	each	Kit - Emergency Sustenance Aircraft Basic Type D-1 Spec. MIL-S-5775A, ~~Date to be furnished by Navy~~ to std 28 August 50 S/N 8330-559219		

P. R. No. 119443
Class 13-C

Government's Exhibit No. 3

(Page Five)

PROCUREMENT DATA LIST

Subject: Purchase Request No. 119443 Holdoff

MCPPXS-21 MCREXU62 Date: 8-29-50

The following data are necessary to the subject procurement:

AF Bulletin No. 23 dated 8-12-50
Numerical List AF and AN Standard Drawings

Specifications:

MIL-S-5775A dated 28 August 1950
MIL-P-5426 dated 28 November 1949
3261A dated 16 June 1947
MIL-P-5374 dated 19 April 1950
MIL-G-4085 dated 21 March 1950
Navy Spec. 74W1 dated 1 September 1944
QQ-W-321A dated 27 November 1946 and Amendment No. 1 dated 19 June 1947
22-275 dated 8 April 1948 and Amendment No. 2 dated 20 October 1948
41036A dated 1 December 1947 and Amendment No. 1 dated 7 April 1950
21051-A dated January 1949 and Amendment No. 3 dated 21 August 1950

USAF Drawings:

45B9008
46D3065
45D18951
4603207 and details on D/L
44G5062
45G18837

44D18526 and details on D/L
44B9156 and the following details:

45D18952	45B28120	44A9163	44A9162
44A9158	44A9161	44A9160	44A9159

MK/elw

Prepared by: .....

Government's Exhibit No. 6

(Page Eight)

PROCUREMENT DATA LIST

Subject: Purchase Request No.: 119432

MCPPXS-21 MCREXU62 Date: 8-25-50

The following data are necessary to the subject procurement:

AF Bulletin No. 28 dated 8-12-50
Numerical List AF and AN Standard Drawings

USAF Drawings

45B9008
45G9049 and details on D/L
46D3085 and the following details
45D18953
46B3041
50C3507 and details on D/L
50D3712 and details on D/L
50J3908 and details on D/L
50B3938 and details on D/L
50J3944 and details on D/L
51B3530 and details on D/L
49B3897 and details on D/L
51F3515 (and details if any)
45H18762
44A9159
44A9162

Specifications

Jan-S-48A dated 21 June 1946
JAN-F-284 dated 5 December 1945
JAN-S-405 dated 30 September 1946 and Amendment No. 3 dated 23 May 1949
JAN-L-655 dated 20 August 1948
MIL-J-818 dated 29 July 1949
MIL-B-830 dated 25 July 1949
MIL-F-6218 dated 4 August 1950
MIL-C-6235 dated 18 August 1950
MIL-R-6238 dated 24 August 1950

Government's Exhibit No. 6

(Page Eight)

MIL-B-6260 dated 24 August 1950
MIL-S-6216 dated 24 August 1950 CONFIDENTIAL
AN-G-26 dated 8 September 1948
3259-B dated 8 June 1949
3260-B dated 24 May 1949
41063 dated 4 March 1946
42-127 dated 5 November 1948
PQD458 dated 31 August 1944
JAN-G-1134 dated 24 June 1949
KK-S-416-A dated 25 September 1942 and Amendment No. 1 dated 24 August 1943

continued

Prepared by: .....

GOVERNMENT'S EXHIBIT No. 7

(Page One)

HoAMC FORM NO. (21 Sep 48) 25B

PURCHASE REQUEST

No 119450

Submitted to: Proc. Div., Hqs., AMC Date of Initiation: 14 Sept. 1950

Section 1.

ITEM	QUANTITY	UNIT	ESTIMATED UNIT PRICE	DESCRIPTION OF SUPPLIES OR SERVICE TO BE PURCHASED	UNIT PRICE	ACTUAL TOTAL PRICE
1	4200	ea	140.66	Sustenance Kit - Individual Long Range Type B-1 Spec MIL-S-6216 S/N 8330-858840 dtd 24 August 50 and requirements set forth in attached Dlvt JUSTIFICATION: This Purchase Request is initiated at the direction of Hqs. USAF per classified message dated 11 August, 1950. EMERGENCY PURCHASE Purchase Request No. 119450 to appear on all contracts	EMERGENCY PURCHASE	

9-4 ✓ 9-8 9-19 no priced bid.

MAINT DATA REQMTS UNIT - WRIGHT FIELD PROCESSED BY: Principal No Data Required

RFP-51-49 dated

Classified by CG Hq USAF

JAMES F. EARLY
Brigadier General
USAF, Chief Sup. Div.

TOTAL ESTIMATED COST	EXP. ORD. NO.	ITEM NUMBER	PROP. CLASS	TOTAL ACTUAL COST
$ 590,772.00	19511		13-C	$ 942,018.00
	PROJECT NO. 421.20			

Section 2.

DELIVER TO: [redacted] AF-903-CSD OOANA M/F Cl. 13-C Stock (USAF)

DESIRED DELIVERY SCHEDULE—MAXIMUM ACCEPTABLE EXTENSION OF DESIRED DELIVERY SCHEDULE.....MONTHS

JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
194....	194....	As soon as possible									

F. O. B. POINT Contractor' Plant POINT OF INSPECTION Contractor' Plant

Section 3.

REMARKS: (Reference Subject by number in space below and list all exhibits and attachments)

1. Recommended Source	2. Sole Source	3. Should Serial Number Be Assigned	4. Tools, patterns, etc. to be loaned by Govt	5.	6. Authority	7. General Remarks
	X					X

Purchase Authority is unknown

$ 94201 & NOV 0 1950

late

By Principal Division

Coordinated - Eng. Stds. Sect.
Date 4-15 5 By
MCREXU62

1. No restrictions as to sources

7. See attached exhibit for government furnished property

7. Request precedence be given to domestic type shipment.

ECOR[redacted] 9/5/50
V Dem. 10/24/50
good 9/19

Section 4.

INITIATION: Upon due inquiry made it was found that the articles enumerated hereon could not be procured from any other branch of The Government without transfer of funds, or the immediate need of these supplies or the remoteness of this Station from point of supply precludes their purchase from any other branch of the Government.

APPROVED BY: (A)	APPROVED BY: (B)
R. J. Fletcher	R. J. Fletcher for
ROBERT I. FLETCHER, COL., USAF	JAMES F. EARLY, BRIG. GEN., USAF
SYMBOL MCMSXC DATE 14 Sept. 50	SYMBOL MCMS DATE 14 Sept. 50
INITIATED BY: M. Moldeven	APPROVED BY: (C)
M. Moldeven	C. M. SCHULTZ, CAPT., USAF
PHONE 5-7287 SYMBOL MCMSXC41	SYMBOL MCMSXC DATE 14 Sept. 50
	APPROVED BY: (D)
	SYMBOL DATE

APPROVAL OF FUNDS: The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to, allotment(s):

5714400 1[illegible]3500 P 421(20)-68 S33-038

The available balance of which is sufficient to cover this cost in an amount not to exceed $ 590,772.00

Actual cost approved For $ 942018.00

(E)	(F)	(G)
EDWARD B. GALLANT, COLONEL, USAF	Edward B. Gallant	JAMES F. EARLY
BUDGET AND FISCAL OFFICER DATE	BUDGET AND FISCAL OFFICER DATE	Brig. General, USAF 10/24/50
		INITIATING ACTIVITY DATE

Section 5.

VENDOR'S NAME AND ADDRESS

9D

NOT ON UNAPPROVED LIST (Initial and date) NCG 10-23-50

CONTRACT NUMBER 16716

PURCHASE ORDER

Government's Exhibit No. 7

(Page Five)

PROCUREMENT DATA LIST

Subject: Purchase Request No.: 119450

MCPPXS-21 MCREXU62 Date: 9-15-50

The following data are necessary to the subject procurement:

AF Bulletin No. 23 dated 9-12-50
Numerical List AF and AN Standard Drawings

AN Drawing—AN6574 dated 29 September 1948

Exhibit—MCREXD5-45 dated 30 August 1950

Specifications:

JAN-S-48A dtd 21 June 46
JAN-L-655 dtd Aug. 48
MIL-J-818 dtd 29 July 49
MIL-F-6218 dated 4 August 1950
MIL-R-6238 dtd 24 August 1950
MIL-S-6216 dtd 24 August 1950
AN-G-26 dtd 8 Sept. 48
3260-B dtd 24 May 49
42-127 dtd 5 Nov. 48
JAN-G-1134 dtd 24 June 49
JAN-F-284 dtd 5 Dec. 45
JAN-S-405 dtd 30 Sept. 46 and Amendment 3 dated 23 May 49
MIL-B-830 dated 25 July 49
MIL-C-6235 dated 18 August 1950
MIL-B-6260 dtd 24 August 1950 and Amendment 1 dtd 6 Sept. 50
3259-B dtd 8 June 49
45963 dtd 4 March 1946
PQD458 dtd 31 August 1944
KK-S-416-A dtd Sept. 42 and Amendment 1 dtd 24 August 1943

Government's Exhibit No. 7

(Page Five)

USAF Drawings:

45B9008
45D18953
46B3041
50D3712 and details on D/L
51F3515
44A9162
45G9049 and details on D/L
46D3085 and details on D/L
51C3507 and details on D/L
50J3908 and details on D/L
45H18762
50B3938 and details on D/L
50J3944 and details on D/L
51B3530 and details on D/L
49B3897 & details on D/L
44A9159

Prepared by: MK/clw

GOVERNMENT'S EXHIBIT No. 8

(Page One)

Contract No. AF 33(038)-17438

C O N T R A C T

(SUPPLIES)

COC/em

DEPARTMENT OF THE AIR FORCE

S. BUCHSBAUM & CO.

(CONTRACTOR)

Contract for Emergency Sustenance Aircraft Kits

Amount, $149,875.00

Place, Air Materiel Command, Wright-Patterson Air Force Base, Dayton, Ohio, Building 120, Area C,

The Finance Officer, U. S. Air Force, Wright-Patterson Air Force Base, Dayton, Ohio, is designated as the officer to make payments in accordance with the contract. The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to allotments below enumerated, the available balances of which are sufficient to cover the cost thereof.

5714400 163-5000 P422(20)-08 S33-038

P.R. No. 119443

Initiator: J. D. Tucker, MCMSXC

Buyer: Jerry Mitchell, 1st Lt USAF, MCPPXG43

Class: 13C

D0—09 Certified under NPA Regulation No. 2.

By Robert E. Adams,
Contracting Officer.

Approved: 6 Jan. 1951
(s) Phillips W. Smith,
Brig. Gen., USAF,
Chief, Prec. Dist.

Copy Received: Sufficient Funds Have Been Obligated To Cover The Maximum Amount of Monies Which The Government is Obligated To Pay Under This Instrument.

Budget and Fiscal Division
By M Dec. 30, 1950

Government's Exhibit No. 8

(Page One)

The office having overall administrative responsibility for this contract is as designated below, and Contractor's Invoices or Vendor's Shipping Documents used as invoices shall be made out to the Finance Officer designated to make payments hereunder, and shall be sent by the Contractor to the Administrative Office listed below for recording and forwarding to the Finance Officer for payment: Chicago AF Procurement Field Office, 1660 East Hyde Park Boulevard, Chicago 15, Illinois.

This contract is authorized by the Armed Services Procurement Act of 1947, Public Law 413, 80th Congress, and has been negotiated pursuant to Section 2(c) (2) of said Act.

(Page Two)

CONTRACT FOR SUPPLIES

THIS CONTRACT, entered into this 16th day of November, 1950, by THE UNITED STATES OF AMERICA, hereinafter called the Government, represented by the Contracting Officer executing this contract, and S. BUCHSBAUM & Co., a corporation organized and existing under the laws of the State of Illinois, of the city of Chicago, in the State of Illinois, hereinafter called the Contractor, witnesseth that the parties hereto do mutually agree as follows:

1. Definitions.—As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department and the head or any assistant head of the executive agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the author-

Government's Exhibit No. 8

(Page Two)

zed representative of a Contracting Officer acting within the limits of his authority.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

2. Changes.—The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specifically manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 90 days from the date of receipt by the Contractor of the notification of change; provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

3. Extras.—Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.

4. Variation in Quantity.—No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufac-

Government's Exhibit No. 8

(Page Two)

turing processes, and then only to the extent, if any, specified elsewhere in this contract.

5. Inspection.—(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to final acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or corrected in place, as requested by the Contracting Officer, by and at the expense of the Contractor promptly after notice and shall not again be tendered for acceptance unless the former tender and either the rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies, when requested by the Contracting Officer, and to proceed promptly with the replacement or correction thereof, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default". Unless the Contractor elects to correct or replace the supplies which the Government has a right to reject and is able to make such correction or replacement within the required delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

Government's Exhibit No. 8

(Page Two)

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Gov

* * *

AF 33(038)-17438

(Page Ten)

32. *Articles and Supplies to be Furnished*

(a) The Contractor shall furnish and supply to the Government the following articles and supplies in the quantity and at the unit and total prices set forth below:

ITEM 1—Twenty Five Hundred (2500) Kits, Emergency Sustenance Aircraft Basic Type D-1, Specification MIL-S-5775A (USAF) dated 28 August 1950, Stock Number 8330-559219 at a unit price of $59.95 and a total price of $149,875.00

ITEM 2—Progress Reports in accordance with Exhibit "A" attached hereto and hereby made a part hereof, the price of which is included in the unit and total prices of Item 1 above.

(b) All costs and expenses of packing, packaging and marking the articles and supplies called for in Item 1 above in accordance with Clause 37 hereof are included in the unit and total prices of Item 1 above.

(c) All references in any Government specification incorporated herein to other Government specifications shall be deemed to include all specifications supplementary to or superseding the specifications so referred to, to the extent that such supplementary or superseding specifications are in effect at the date of Contractor's latest quo-

Government's Exhibit No. 8

(Page Ten)

tation, if the Contractor was furnished or otherwise noti- of the existence of such supplementary or superseding specification at the time of said quotation.

(d) Variation in the quantity of articles and supplies called for in Item 1 above, not in excess of Three (3) per cent and subject to the provisions of Clause 4 hereof, will be acceptable.

(e) The Contractor grants to the Government the right at any time during the life of the contract, to increase the quantity or quantities of the supplies called for herein, at not more than the unit price stated, by an amount not exceeding Fifty (50) per cent of the entire contract price, said increase to be applied as to all or any item or items, at the option of the Government. This right shall be exercised by the Contracting Officer through the issuance of an Amendment or Change Order.

(f) It is hereby understood and agreed that the Government will furnish to the Contractor, the Government Furnished Property listed below, subject to the provisions of Clause 22 hereof, from MIL-S-5775A (USAF) and the Contractor is hereby relieved from furnishing said items:

AF 33(038) 17438

GOVERNMENT'S EXHIBIT No. 9

(Page One)

Contract Files Procurement Copy

AWARD (SUPPLY CONTRACT)	CONTRACT NO. AF 33(038)-[illegible]136	PAGE NO. 1	NUMBER OF PAGES OF AWARD

Plaintiff 9 Exhibit

DATE OF AWARD 18 December 1950	INVITATION NO. 33-038-51-1053
TO (Contractor and address) S. BUCHSBAUM & CO. 1737 South Michigan Ave. Chicago 16, Illinois	ISSUED BY Headquarters, Air Material Command Procurement Division, Services Section Advertising and Orders Branch, MCPPS-2 Wright-Patterson Air Force Base Dayton, Ohio
INVOICE FOR PAYMENT SHOULD BE MAILED TO The AF Procurement Office of Administration named below.	PAYMENT WILL BE MADE BY Accounting and Disbursing Officer, U.S.A.F., Chicago AF Procurement Field Office, 1660 East Hyde Park Blvd., Chicago 15, Illinois

Your bid on the above numbered Invitation for Bids is hereby accepted as to the items enumerated below with the additions or changes made by you, which additions or changes are set forth in full below.

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
	Class 13C				
	In accordance with telegram dated 7 December 1950.				
	THIS IS THE CONTRACT REFERRED TO IN NOTICE OF AWARD DATED 18 DECEMBER 1950.				
	Award has been approved by the approving authority required by DOI-70-3.				
1.		2,500	ea.	$57.95	$144,875.00
	DISCOUNT: 1/2% - 10 calendar days.				
	DO-09 certified under NPA Regulation No. 2.				

Robert E. Adams

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of units)	UNIT	UNIT PRICE	AMOUNT
	Class 13C				
	In accordance with telegram dated 7 December 1950.				
	THIS IS THE CONTRACT REFERRED TO IN NOTICE OF AWARD DATED 18 DECEMBER 1950.				
	Award has been approved by the approving authority required by DOI-70-3.				
1.		2,500	ea.	$57.95	$144,875.00
	DISCOUNT: 1/2% - 10 calendar days.				
	DO-09 certified under NPA Regulation No. 2.				

Robert E. Adams
ROBERT E. ADAMS
Contracting Officer

The Office having overall administrative responsibility for this contract is as designated below and Contractor's Invoices or Vendor's Shipping Documents used as invoices shall be made out to the Finance Officer designated to make payment hereunder, and shall be sent by the Contractor to the Administrative Office listed below for recording and forwarding to the Finance Officer for payment.

Chief, Chicago AF Procurement Field Office
1660 East Hyde Park Boulevard
Chicago 15, Illinois

TOTAL AMOUNT	$144,875.00

This Award consummates the contract, which consists of the following documents, including any Continuation Sheets thereto: *(a)* the Government's Invitation for Bids and your Bid, *(b)* the Schedule, *(c)* the General Provisions, and *(d)* the Government's Award. No further contractual document is necessary.

UNITED STATES OF AMERICA

BY Robert E. Adams
ROBERT E. ADAMS
CONTRACTING OFFICER

Standard Form 33
Nov. 1949 Edition

Government's Exhibit No. 9

(Page Three)

Standard Form 36
Prescribed by General Services Administration, Nov. 1949 Edition
CJJ

INVITATION AND BID
(SUPPLY CONTRACT)

ISSUED BY: Headquarters, Air Materiel Command
Procurement Division, Services Section -
Advertising and Orders Branch, MCPPXS2

ADDRESS: Wright-Patterson Air Force Base
Dayton, Ohio

DEPARTMENT: AIR FORCE
Lt. J. Mitchell
MCPPXG43

INVITATION FOR BIDS

DATE ISSUED: 7 November 1950

INVITATION NO.: 33-038-51-1053

Sealed bids in (1 Original & 1 Carbon) DUPLICATE, SUBJECT TO THE TERMS AND CONDITIONS OF THIS INVITATION FOR BIDS AND THE ATTACHED SCHEDULE AND GENERAL PROVISIONS, will be received at the above office until 11 o'clock A. m., E.S.T. 17 November 1950 *(date)* and at that time will be publicly opened, for furnishing the supplies or services described in the accompanying Schedule.

General information and instructions to bidders are contained in the terms and conditions on the reverse hereof.

Class 13C

BID

DATE: November 16,1950

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within 10 calendar days *(60 calendar days unless a different period be inserted by the bidder)* from the date of the opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) and within the time specified in the Schedule accompanying the above Invitation for Bids.

E.S.T. 17 November 1950 *(date)* and at that time will be publicly opened, for furnishing the supplies or services described in the accompanying Schedule.

General information and instructions to bidders are contained in the terms and conditions on the reverse hereof.

Class 13C

BID

DATE: November 16,1950

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within 10 calendar days *(60 calendar days unless a different period be inserted by the bidder)* from the date of the opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) and within the time specified in the Schedule accompanying the above Invitation for Bids.

BIDDER REPRESENTS: *(Check appropriate boxes)*

(1) That the aggregate number of employees of the bidder and its affiliates is: ☐ 500 or more, ☒ less than 500.

(2) That he is a ☐ regular dealer in, ☒ manufacturer of, the supplies bid upon.

(3) That he ☐ has, ☒ has not, employed or retained a company or person *(other than a full-time employee)* to solicit or secure this contract, and agrees to furnish information relating thereto as requested by the contracting officer.

TYPE OF BUSINESS *(Check appropriate box)*

☐ Individual ☐ Partnership ☒ Corporation

INCORPORATED IN THE STATE OF *(Complete, if corporation)*: Illinois

FULL NAME OF BIDDER *(Type or print)*: S. BUCHSBAUM & COMPANY

BUSINESS ADDRESS OF BIDDER *(Street, city, zone, and State. Type or print)*:
1737 South Michigan Avenue
Chicago 16, Illinois

TELEPHONE NO.: WAbash 2-1600

SIGNATURE AND TITLE OF PERSON AUTHORIZED TO SIGN THIS BID *(Type or print name and title underneath)*:

Chester Buchsbaum
President

Standard Form 33
Nov. 1949 Edition

Government's Exhibit No. 9

(Page Four)

Standard Form 31
Prescribed by General Services Administration, Nov. 1949 Edition

SCHEDULE
(SUPPLY CONTRACT)

PAGE NO. 1 | NUMBER OF PAGES OF SCHEDULE 1

REQUISITION NUMBER OR OTHER PURCHASE AUTHORITY: P.R. No. 119443 . Tucker MC/SEC

INVITATION NO: 33-038-51-1053

SUBCONTRACTING CONTEMPLATED: Bidder represents that the estimated percentage of subcontracting contemplated on this procurement is 90 per cent.

Accounting and Appropriation Data will be included as a Special Provision at the time of Award.

The supplies or services to be furnished, the specifications, the discounts, the time and place of delivery, and any other special terms and conditions applicable to the Invitation for Bids, are set forth below.

DISCOUNTS WILL BE ALLOWED BY BIDDER FOR PROMPT PAYMENT AS FOLLOWS:

1/2 PERCENT, 10 CALENDAR DAYS; 0 PERCENT, 20 CALENDAR DAYS; 0 PERCENT, 30 CALENDAR DAYS.

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of Units)	UNIT	UNIT PRICE	AMOUNT
	NOTE: A. Bidders receiving this invitation as a result of being on the mechanized mailing list will be removed from the list for the items on this invitation if they do not respond by bidding, or furnishing reason for not bidding prior to the opening date, to MCPPXS-2. B. Award made as a result of this Invitation will be subject to the Authority granted by National Production Authority Regulation No. 2 dated 3 October 1950.				

DISCOUNTS WILL BE ALLOWED BY BIDDER FOR PROMPT PAYMENT AS FOLLOWS:

1/2 PERCENT, 10 CALENDAR DAYS; 0 PERCENT, 20 CALENDAR DAYS; 0 PERCENT, 30 CALENDAR DAYS.

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number of Units)	UNIT	UNIT PRICE	AMOUNT
NOTE: A. Bidders receiving this invitation as a result of being on the mechanized mailing list will be removed from the list for the items on this invitation if they do not respond by bidding, or furnishing reason for not bidding prior to the opening date, to MCPPXS-2. B. Award made as a result of this Invitation will be subject to the Authority granted by National Production Authority Regulation No. 2 dated 3 October 1950.					
1.	Kit - Emergency Sustenance Aircraft Basic Type D-1 Spec. MIL-S-5775A dated 28 August 1950. S/N 8330-559219	2,500	Ea.	$57.95	$144,875.00
	NOTE: 1. In the event that the end products or component parts thereof to be furnished under this bid have been previously Government-owned, or have been retained on contract termination inventory or have been acquired by the bidder at any sale of Government surplus property and no value has been added to such property by modification, overhaul or improvement such fact will be stated by the offering bidder. 2. Any bidder offering such products as indicated above shall furnish a certification, attached to the bid, to the effect that the products being offered are strictly in accordance with the latest revision to any specifications or drawings referenced herein, and further, that all inspection requirements called out in any referenced specification can be met by the bidder.				

NAME OF BIDDER

S. BUCHBAUM & COMPANY

Standard Forms 31
Nov. 1949 Edition

GOVERNMENT'S EXHIBIT No. 10

(Page One)

Contract No. AF 33(038)-16916

FIXED PRICE
CONTRACT
(SUPPLIES)
COC/dm

DEPARTMENT OF THE AIR FORCE
CAPPEL, MacDONALD & COMPANY
(CONTRACTOR)

Not to Exceed

Contract for Sustenance Kits.....*Amount*, $3,184,918.00
Place, Air Materiel Command, Wright-Patterson Air Force Base, Dayton, Ohio, Building 120, Area "C",

The Finance Officer, U. S. Air Force, Wright-Patterson Air Force Base, Dayton, Ohio, is designated as the officer to make payments in accordance with this contract. The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to allotments below enumerated, the available balances of which are sufficient to cover the cost thereof.

5714400 163.5000 P 421(20)-08 S 33-038

P.R.s 119432 and 119450
Initiator: M. Moldeven, MCMSXC41
Buyer: Lt. Jerry Mitchell, MCPPXG43
Class: 13-C

DO-09 certified under NPA Regulation No. 2.

By ROBERT E. ADAMS,
Contracting Officer

Approved: 10 Nov. 1950
(s) PHILLIPS W. SMITH,
Brig. Gen., U.S.A.F.,
Chief, Procurement Div.

Copy received: Sufficient Funds Have Been Obligated To Cover The Maximum Amount of Monies Which The Government is Obligated To Pay Under This Instrument.

BUDGET AND FISCAL DIVISION
By J.M. Nov. 9, 1950

Government's Exhibit No. 10

(Page One)

The office having overall administrative responsibility for this contract is as designated below, and Contractor's Invoices or Vendor's Shipping Documents used as invoices shall be made out to the Finance Officer designated to make payments hereunder, and shall be sent by the Contractor to the Administrative Office listed below for recording and forwarding to the Finance Officer for payment: Dayton AF Procurement Field Office, Wright-Patterson Air Force Base, Dayton, Ohio, MCPPFV.

This contract is authorized by the Armed Services Procurement Act of 1947, Public Law 413, 80th Congress, and has been negotiated pursuant to Section 2(c) (2) of said Act.

(Page Two)

CONTRACT FOR SUPPLIES

THIS CONTRACT, entered into this 30th day of October, 1950, by the UNITED STATES OF AMERICA, hereinafter called the Government, represented by the Contracting Officer executing this contract, and CAPPEL, MACDONALD & COMPANY, a corporation organized and existing under the laws of the State of Ohio, of the city of Dayton, in the State of Ohio, hereinafter called the Contractor, witnesseth that the parties hereto do mutually agree as follows:

1. Definitions.—As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the author-

Government's Exhibit No. 10

(Page Two)

ized representative of a Contracting Officer acting within the limits of his authority.

(e) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

2. Changes.—The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specifically manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 90 days from the date of receipt by the Contractor of the notification of change; provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

3. Extras.—Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.

4. Variation in Quantity.—No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufac-

Government's Exhibit No. 10

(Page Two)

turing processes, and then only to the extent, if any, specified elsewhere in this contract.

5. Inspection.- (a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to final acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or corrected in place, as requested by the Contracting Officer, by and at the expense of the Contractor promptly after notice and shall not again be tendered for acceptance unless the former tender and either the rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies, when requested by the Contracting Officer, and to proceed promptly with the replacement or correction thereof, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default". Unless the Contractor elects to correct or replace the supplies which the Government has a right to reject and is able to make such correction or replacement within the required delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

Government's Exhibit No. 10

(Page Ten)

(c) All costs and expenses of packing, packaging and marking the articles called for in Item 1 above in accordance with Clause 37 hereof are included in the unit and total prices of said Item 1 above.

(Page Eleven)

(d) Variation in the quantity of articles called for in Item 1 above not exceeding two (2) per cent, and subject to the provisions of Clause 4 hereof, will be acceptable.

(e) It is hereby understood and agreed that the Government will furnish to the Contractor the Government-Furnished Property listed below, subject to the provisions of Clause 22 hereof:

42,600 Cartridges, .22 Hornet—50 rounds per box ORD.
85,200 Food Packets, Individual Survival SA-1, S/N 6780-285006
14,200 Magazines, for M-4 (T-38) Rifle, Harrington-Richards.
14,200 Manual Survival, SA-1.
14,200 Oiler-Carbine, Cal. .30, M-1.
14,200 Rifles, Survival, M-4 (T-38).

(f) *Item Identification*: The following items shall not be labeled with any markings except those pertaining to instructions for use of the item. This includes inspectors stamp, U.S. Government Property, Trade Names, Manufacture, Names, Part Numbers, etc.:

(1) Raincoat, Survival Kit, Boot—Mukluk
(2) Magazine (Manual) Survival
(3) Bags, Sleeping M-1949
(4) Headnet Mosquito
(5) Fishing Kit, Instruction Booklet
(6) Chamois
(7) Canteen Assembly
(8) Skillet—Container Assembly
(9) Sheath—Survival Hunting Knife
(10) Container Assembly—Bail-out Quick Attachable

Government's Exhibit No. 10

(Page Two)

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Gov-

* * *

AF 33(038)-16916

(Page Ten)

32. *Articles to be Furnished*

(a) The Contractor shall furnish and deliver to the Government the following articles in the quantities and at the unit and total prices set forth below:

ITEM 1—Fourteen Thousand Two Hundred (14,200) Sustenance Kits, Individual, Long Range, Type E-1, Specification MIL-S-6216, dated 24 August 1950, as amended by paragraph (b) below, provided that Exhibit MCREXD5-45 dated 30 August 1950, attached hereto and hereby made a part hereof, shall be used in conjunction with AN Drawing AN229 as additional requirements to said Specification MIL-S-6216 and that the color of the gloves conforming to Specification AN-G-26 shall be Olive Drab, Shade 613, as given in ANA Bulletin 157; Stock Number 8330-858840. The unit price of the articles called for in this Item is $203.90 each, and the total price is ..... $2,895,380.00.

ITEM 2—Progress Reports, the price of which is included in Item 1 above.

Government's Exhibit No. 10

(Page Eleven)

(11) Individual Emergency Sustenance Tent Assembly —One man, all area, survival

(12) Gloves, Intermediate
Gloves, Leather Mitten X-2
Gloves, Mitten, Knit X-3

(13) Mirror

(g) Increase Option: The Contractor grants to the Government the right at any time during the life of this contract to increase the quantity or quantities of the supplies called for herein at a price to be negotiated, but not more than the unit price stated herein, by an amount that would not exceed fifty (50) per cent of the entire contract price, said increase to be applied as to all or any item or items at the option of the Government. This right shall be exercised only by written request of the Contracting Officer. In the event this contract contains a price revision clause, the unit price and the total price referred to above shall be deemed to be the revised unit and total prices in effect at the date or dates this increase option is exercised.

(h) It is hereby understood and agreed that no war surplus material and/or parts will be used in the manufacture of any equipment called for herein except as may be authorized in writing by the Contracting Officer.

AF (33(038)-16916

Government's Exhibit No. 11

(Page Two)

ITEM	DESCRIPTION	QUAN.	UNIT	UNIT PRICE	TOTAL PRICE
1	Kit—Emergency Sustenance Aircraft Basic Type D-1 Spec. MIL-S-5775A dated 28 Aug 1950 S/N 8330 559219	6,000	each	$70.97	$425,800.00

NOTE: The Contractor is to furnish one new item—Salt tablets, N.F. 0.6 Grams, Enteric Coated.

SPECIAL PROVISIONS

1. PROPOSAL:
   Letter dated February 26, 1951 and letter dated April 17, 1951.
2. GOVERNMENT BILLS OF LADING:
   Shipment/s shall be made on Government Bills of Lading. The Contractor will make application/s therefor on AMC Form No. 63A addressed to Commanding Officer, Mid-Central Air Procurement District, Attn: Commercial Traffic Section, 1600 E. Hyde Park Blvd., Chicago 15, Illinois.
   In inserting descriptions in Government Bills of Lading, the Contractor will comply with the rules and provisions of the freight classifications and tariffs of the carrier/s involved.
3. ACCOUNTING AND DISBURSING OFFICER:
   Accounting and Disbursing Officer
   U. S. A. F.
   Mid Central Air Procurement District
   1660 E. Hyde Park Blvd
   Chicago 15, Illinois
4. DELIVERY:
   Start within 30 days after receipt of GFP at the rate of 2,000 each item 1 each 30 days until complete.
5. VARIATION IN QUANTITIES:
   With reference to General Provision No. 4, Variation in Quantities called for herein will be accepted as a compliance with this contract in an amount not exceeding 1 percent.

Government's Exhibit No. 12

(Page Two)

SCHEDULE

PART I—Articles to be Furnished:

(a) The Contractor shall furnish and supply to the Government the following articles in the quantities and at the unit and total prices set forth below:

ITEM 1—Two Thousand (2,000) Kits, Emergency Sustenance, Cold Climate, Seat Style, Type B-1, Specifications MIL-S-6226A dated 24 January 1951 and in accordance with Exhibit MCREXD5-45 dated 30 August 1950 and Exhibit MCREXD5-43 dated 28 August 1950, all incorporated herein by reference. The color of the glove conforming to Specification MIL-G-822 shall be seal brown shade 102 as given in USA Specification 3-F. The color of the gloves conforming to Specifications MIL-G-835 and AN-G-26 shall be Olive Drab shade 613 as given in ANA Bulletin 157; Stock Number 2010-559136, at a unit price of $103.158 each and a total price of $206,316.00

ITEM 2—Ten Thousand (10,000) Kits, Emergency Sustenance, Temperate Climate, Seat Style Type C-1, Specification MIL-S-6227A dated 24 January 1951 except in paragraph 3.3 "Components" Item 9, add Olive Drab, Shade 613 as given in ANA Bulletin 157 after M1949. The Kit shall also be in accordance with Exhibit MCREXD5-45 dated 30 August 1950, incorporated herein by reference. The color of the glove conforming to Specification MIL-G-822 shall be seal brown Shade 102 as given in USA Specification 3-F; Stock Number 2010-559136-5, at a unit price of $49.66 and a total price of $496,600.00

(b) All costs and expenses of packing, packaging, and marking the articles called for in Items 1 and 2 above in accordance with Part III hereof are included in the unit and total prices of said Items 1 and 2 above.

Government's Exhibit No. 10

(Page Ten)

(b) Specification MIL-S-6216, Paragraph 3.2, Table I, Item No. 14, is hereby amended for the purposes of this contract as follows:

Drawing No. 46D3085 (First Aid Kit, C-1 Vest Type)

(1) Item No. 1: Specify a 14-gram tube in lieu of 18-gram tube.

(2) Item No. 10: "Six (6) Amphetamine Sulfate tablets, 0.01 gram each scored tablets, in rigid plastic vial approximately ½" O.D. by 1¾" long O.D., etc." in lieu of as specified. Use words "Amphetamine Sulfate" where "Benzedrine" appears.
(Delete par. CCX 2)

(3) Item No. 5: Delete entire item "1.5 cc. Syrette solution of Morphine Tartrate ½ grain in 1.5 cc."

(4) Item No. 9: Delete entire item "Sulfadiazine . . . etc.".

(5) Item No. 6: Change quantity of tablets from 15 to 30, and change size of vial from ⅝" by 1-3/16" to ½" by 1¾" O.D. Change vial material to rigid plastic.

(6) Item No. 8: Change quantity of tablets from 12 to 36, and pack in three (3) vials, 12 tablets/vial, ⅜" by 1⅞" O.D. and vial made of rigid plastic.

(7) Item No. 4: Delete the words "Band Aid" and add "Bandage, Gauze, Adhesive".

(8) After all items add the words "or equal".

Drawing No. 46B3041 (Instruction Decal for First Aid Kit)

(1) Delete reference to wounds, because sulfa has been removed.

(2) Delete reference to large bandage and sulfanilamide.

(3) Delete reference to morphine.

(4) Delete the word "Benzedrine" and add the word "Amphetamine".

Government's Exhibit No. 12

(Page Two)

(c) All references in any Government specification incorporated herein to other Government specifications shall be deemed to include all specifications supplementary to or superseding the specifications so referred to, to the extent that such supplementary or superseding specifications are in effect at the date of Contractor's latest quotation, if the Contractor was furnished or otherwise notified of the existence of such supplementary or superseding specification at the time of said quotation.

(d) The Government will furnish to the Contractor for installation in the articles called for in Items 1 and 2 above, in accordance with the provisions of Clause 36 of the General Provisions hereof, the following Government Furnished Property:

Item 1—Fiber Glass Seat Pan only

Item 2—The following Government Furnished Property:

(Page Three)

ITEM NO.	DESCRIPTION	IDENTIFICATION	QUANTITY
1	Bag, Sleeping, M 1949 — Type I Size Large.	Spec. MIL-B-830 MIL-B-830	1 each
7	Food Packet, Individual, Survival Type ST, QM		4 each
12	Manual, Survival	64-0-1	1 each
14	Oiler, Carbine, Cal., .30 M-1, filled with JAN-L-644 Oil	Ord	1 each
15	Rifle—Shotgun, Survival Cal. .22/.410 M-6 (Ser. 3,564)		1 each

3.2 GENERAL. The sustenance kit shall consist of a vent style container, furnished Government Furnished Property, conforming to Drawing No. 48F3865, packed with the equipment specified herein.

Contractor will comply with Specification MIL-S-6529A except Contractor shall not furnish Items 7, 16, 18 and 20 thereof, for Item 1 only.

Government's Exhibit No. 12

(Page Three)

(e) It is hereby understood and agreed that no war surplus material and/or parts will be used in the manufacture of any equipment called for herein except as may be authorized in writing by the Contracting Officer.

(f) The Contractor hereby warrants that the prices quoted herein are not in excess of prices currently being charged any other purchaser of a similar or identical article.

(g) The Contractor warrants that the prices shown are not in excess of applicable ceiling prices established by the Economic Stabilization Agency or other authorized agency and in effect upon the date hereof, for the supplies or services to be furnished hereunder.

PART II—Delivery:

(a) The Contractor shall deliver the articles called for in Items 1 and 2 of Part I hereof beginning within 30 days after date of receipt by the Contractor of all Government Furnished Property specified herein, and deliveries shall be made at the rate of 33-1/3% of the total quantity called for herein each consecutive 30 day period after said beginning date until completion.

(b) The Contractor shall deliver the articles called for in Items 1 and 2 of Part I hereof to the Government f.o.b. as specified in Clause 33 of the General Provisions hereof and consigned as follows:

ITEM	QUANTITY	TO:
2	6000	Transportation Officer Ogden Air Materiel Area Hill Air Force Base Utah For: AF 963 CSD M/F "AF Account"

AF 33(038)-25634

GOVERNMENT'S EXHIBIT No. 11

(Page One)

MCP 71-400 (Rev 15 Sep 50) Recommended by MCPPIC43 (JM) Hq., AMC

Address all correspondence regarding this order for attention of AF Office of Administration named below.

UNITED STATES AIR FORCE
AIR MATERIEL COMMAND
Wright-Patterson Air Force Base
Dayton, Ohio

PURCHASE ORDER

CONTRACT No. AF 33(038)-26641

To insure prompt payment, place this Order Number on all Packages, Bills, and Correspondence.

To S. BUCHSBAUM & CO.
1737 S. Michigan Ave.
Chicago, Ill.

Date 31 May 1951

Delivery See "DELIVERY"

Ship to See "SHIPPING INSTRUCTIONS"

Terms: Net [redacted]

ALL ARTICLES MUST BE DELIVERED F. O. B. CARRIER'S EQUIPMENT Chicago, Ill.

In accordance with your See "PROPOSAL" proposal dated and subject to all conditions and requirements hereof and to all advertisements, circulars, specifications, and samples, expressly described or referred to herein, award is hereby made you for furnishing the following articles at the prices shown and at the time, place, and in the manner herein specified.

Item No.	Quantity	Unit	Class 13-C ARTICLE	Unit Price	Total Price
	THIS IS	THE	CONTRACT REFERRED TO IN NOTICE OF AWARD DATED 31 MAY 1951.		
—	-	-	Contractor shall furnish the items as listed herein.	-	$425,800.00
	AWARD HAS BEEN APPROVED BY THE APPROVING AUTHORITY REQUIRED BY DOI 70-3.				
			DO-21 certified under NPA Regulation No. 2.		
			This contract NEGOTIATED under authority of Act of February 19, 1948 (Public Law 413-80th Congress), Section 2(c)(1).		

The Office having overall administrative responsibility for this contract is as designated below and Contractor's Invoices or Vendor's Shipping Document used as Invoices shall be made out to the Finance Officer designated to make payments hereunder, and shall be sent by the Contractor to the Administrative

ALL ARTICLES MUST BE DELIVERED F. O. B. CARRIER'S EQUIPMENT Chicago, Ill.

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			DO-21 certified under NPA Regulation No. 2.		
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The Office having overall administrative responsibility for this contract is as designated below and Contractor's Invoices or Vendor's Shipping Document used as Invoices shall be made out to the Finance Officer designated to make payments hereunder, and shall be sent by the Contractor to the Administrative Office listed below for recording and forwarding to the Finance Officer for payment.

Commanding Officer
Mid-Central Air Procurement District
1660 E. Hyde Park Blvd.
Chicago 15, Illinois

Contract File
PM 6-13-51

Cont'd on Page 2

EXPENDITURE ORDER NO. FY-1951

Final inspection and acceptance ~~xxx~~ shall be at Contractor's Plant, S. Buchsbaum & Co. Chicago, Ill.

When ready for inspection, or, if practicable, ten days in advance thereof, notify Commanding Officer, Mid-Central Air Procurement District, 1660 E. Hyde Park Blvd., Chicago 15, Illinois.

The supplies and/or services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to, Allotment 5714400 163-5000 P422(20)-08 S33-038 to cover the cost of same. See "ACCOUNTING AND DISBURSING OFFICER" the available balance of which is sufficient. The Finance Officer, MCMSXC41, is hereby designated to make payment for such supplies and/or services.

DEPT. No. Caffney CHARGE No. 422.20
P. R. No. 133766-C

Jerry Mitchell Capt USAF
Contracting Officer
JERRY MITCHELL
CAPTAIN, USAF

Air Force-WPAFB-(S)

GOVERNMENT'S EXHIBIT No. 12

(Page One)

Plaintiff's Exhibit

DEPARTMENT OF DEFENSE NEGOTIATED CONTRACT CCC/aak	DEPARTMENT OF THE Air Force	CONTRACT NO. AF 33(038)-26634
ISSUING OFFICE		
NAME Air Material Command Initiator: E. J. Gaffney, MCREXCh1 Buyer: J. Mitchell, Capt USAF, MCPPDh3	ADDRESS Wright-Patterson Air Force Base Dayton, Ohio	
CONTRACTOR		
NAME CAPPEL, MACDONALD & CO.	ADDRESS Cappel Bldg., 129 South Ludlow St., Dayton, Ohio.	
CONTRACT FOR Survival Kits	Class: 13C	AMOUNT : 782,916.00

APPROPRIATION AND OTHER ADMINISTRATIVE DATA

57124400 163-5000 Pl22(20)-08 833-038

P.R: 133709-C

CONTRACT FILES

Payment will be made by Disbursing Officer, Wright-Patterson Air Force Base, Building 120, Area "C", Dayton, Ohio.

Administrative Office: Central Air Procurement District, West Warren Avenue and Lonyo Boulevard, Detroit 32, Michigan.

Invoices (or Vender's Shipping Documents used as invoices) shall be made out to the Disbursal Officer and mailed to the Administrative Office.

DO-21 certified under MPA Regulation No. 2.

The award of this contract has been approved by the Chief, Procurement Division, USAF, on 31 May 1951 and award made 4 June 1951.

Payment will be made by Disbursing Officer, Wright-Patterson Air Force Base, Building 120, Area "C", Dayton, Ohio.

Administrative Office: Central Air Procurement District, West Warren Avenue and Lonyo Boulevard, Detroit 32, Michigan.

Invoices (or Vender's Shipping Documents used as invoices) shall be made out to the Disbursal Officer and mailed to the Administrative Office.

DO-21 certified under MPA Regulation No. 2.

The award of this contract has been approved by the Chief, Procurement Division, USAF, on 31 May 1951 and award made 4 June 1951.

This negotiated contract is entered into pursuant to the provisions of Section 2 (c) (1) of the Armed Services Procurement Act of 1947 (*Public Law 413, 80th Congress*), and any required determination and findings have been made.

THIS CONTRACT is entered into as of 4 June, 19 51, by and between the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and CAPPEL, MACDONALD & CO.,
(NAME OF CONTRACTOR)

(1) a corporation organized and existing under the laws of the State of Ohio

[redacted]

[redacted]

hereinafter called the Contractor. The parties hereto agree that the Contractor shall furnish and deliver all the supplies and perform all the services set forth in the attached Schedule, for the consideration stated therein

Government's Exhibit No. 7

(Page Eighteen)

2.1.1 SPECIFICATIONS.—

MILITARY

JAN-S-48	Socks, Wool, Cushion-Sole, O. D.
JAN-P-105	Packaging and Packing for Overseas Shipment, Boxes, Wood, Cleated Plywood
JAN-P-106	Packaging and Packing for Overseas Shipment—Boxes, Wood, Nailed
JAN-P-108	Packaging and Packing for Overseas Shipment—Boxes, Fiberboard, (V-Board and W-Board), Exterior and Interior
JAN-P-125	Packaging and Packing for Overseas Shipment—Barrier-Materials, Waterproof, Flexible
JAN-P-127	Packaging and Packing for Overseas Shipment; Tape; Adhesive, Pressure-Sensitive, Water Resistant
JAN-P-139	Packaging and Packing for Overseas Shipment—Plywood, Container Grade
JAN-P-140	Packaging and Packing for Overseas Shipment—Adhesives, Water-Resistant, Case-Liner
JAN-L-644	Lubricating-Oil, Preservative, Special
JAN-L-655	Lipstick, Anti-Chap and Sunburn-Protective
MIL-J-818	Jackknife, Utility
MIL-M-1513	Matches, Ordinary, Water Resistant
MIL-G-4085	Goggles, Folding
MIL-F-6218	Fishing Kit, Survival
MIL-W-15117	Water, Emergency Drinking (In Sealed Cans)

Government's Exhibit No. 1

(Page Eighteen)

AIR FORCE—NAVY AERONAUTICAL

AN-B-20	Barrier; Flexible Sheet Moisture Vapor

U. S. AIR FORCE

3261	Glove, Flying, Very Light, Mosquito Resistant, Type K-1
21051	Compass; Wrist, Non-Liquid, Type L-1
26756	Paulin, Life Raft Utility
41063	Mirror; Emergency Signaling, Type B-1

GOVERNMENT'S EXHIBIT No. 13

(Page One)

[redacted] CONTRACT [redacted]

[redacted]

[redacted]

ADDRESS

[redacted] Wright-Patterson Air Force Base
[redacted]

CONTRACTOR

NAME

[redacted]

ADDRESS

Coppel Building
Dayton, Ohio

Plaintiff /3 Exhibit

CONTRACT FOR

[redacted] Class: [redacted]

AMOUNT

709,400.00

APPROPRIATION AND OTHER ADMINISTRATIVE DATA

[redacted] 163-9900 [redacted] [redacted]

P.R. No. [redacted]

Payment will be made by Disbursing Officer, Central Air Procurement District, Detroit, Michigan.

Administrative Office: Central Air Procurement District, West Warren Avenue & Lingo Boulevard, Detroit 32, Michigan.

Invoices (or Vendor's Shipping Documents used as invoices) shall be made out to the Disbursing Officer and mailed to the Administrative Office.

DO-XX certified under ASPR Regulation No. 2.

The award of this contract has been approved by the Deputy Chief, Procurement Division, USAF, on 26 June 1951 and award made 29 June 1951.

CONTRACT FILES

[redacted] [redacted] [redacted] 709,400.00

APPROPRIATION AND OTHER ADMINISTRATIVE DATA

[redacted] 163-9900 [redacted] [redacted]

P.R. No. [redacted]

Payment will be made by Disbursing Officer, Central Air Procurement District, Detroit, Michigan.

Administrative Office: Central Air Procurement District, West Warren Avenue & Lingo Boulevard, Detroit 32, Michigan.

Invoices (or Vendor's Shipping Documents used as invoices) shall be made out to the Disbursing Officer and mailed to the Administrative Office.

DO-XX certified under ASPR Regulation No. 2.

The award of this contract has been approved by the Deputy Chief, Procurement Division, USAF, on 26 June 1951 and award made 29 June 1951.

CONTRACT FILES

This negotiated contract is entered into pursuant to the provisions of Section 2 (c) (1) of the Armed Services Procurement Act of 1947 (*Public Law 413, 80th Congress*), and any required determination and findings have been made.

THIS CONTRACT is entered into as of 29 June, 19 51, by and between the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and [redacted]

(NAME OF CONTRACTOR)

(*i*) a corporation organized and existing under the laws of the State of Ohio

(*ii*) a partnership consisting of [redacted]

(*iii*) an individual trading as [redacted]

hereinafter called the Contractor. The parties hereto agree that the Contractor shall furnish and deliver all the supplies and perform all the services set forth in the attached Schedule, for the consideration stated therein.

AD Form No. 351

U.S. GOVERNMENT PRINTING OFFICE 16—69510-1

Government's Exhibit No. 13

(Page Two)

SCHEDULE

PART I—Articles to be Furnished:

(a) The Contractor shall furnish and supply to the Government the following articles in the quantities and at the unit and total prices set forth below:

ITEM 1—Ten Thousand (10,000) Kits—Emergency Sustenance, Hot Climate, Seat Style, F-1, in accordance with Specification MIL-S-6538 dated 30 April 1951, Stock No. 2010-559138, at a unit price of $70.94 each and a total price of $709,400.00

(b) All costs and expenses of packing, packaging, and marking the articles called for in Item 1 above in accordance with Part III below are included in the unit and total prices of said Item 1 above.

(c) All references in any Government specification incorporated herein to other Government specifications shall be deemed to include all specifications supplementary to or superseding the specifications so referred to, to the extent that such supplementary or superseding specifications are in effect at the date of Contractor's latest quotation, if the Contractor was furnished or otherwise notified of the existence of such supplementary or superseding specification at the time of said quotation.

(d) The Contractor grants to the Government the right at any time during the life of this contract to increase the quantity or quantities of the supplies called for herein at a price to be negotiated, but not more than the unit price stated herein, by an amount that would not exceed fifty (50) percent of the entire contract price, said increase to be applied as to all or any item or items at the option of the Government. This right shall be exercised only by written request of the Contracting Officer.

(e) Variations in the quantity of the articles called for in Item 1 above not exceeding one-half (½) of one (1) percent and subject to the provisions of Clause 4 of the General Provisions hereof will be acceptable.

Government's Exhibit No. 1

(Page Two)

(f) The Government will furnish to the Contractor for installation in the articles called for Item 1 above, in accordance with the provisions of Clause 22 of the General Provisions hereof the following G.F.P.:

Two (2) Food Packet, Individual, Survival ST 2, QM
One (1) Manual, Survival (Religious Information included), 64-5, Class 30A
One Rifle, Shotgun, Survival, Cal. .22/.410 M 6, ORD
One (1) Contoured Fiberglass Seat Pan

(g) It is hereby understood and agreed that the articles and supplies called for herein shall not be manufactured from war surplus material and/or parts except as may be authorized in writing by the Contracting Officer.

(h) The Contractor hereby warrants that the prices quoted herein are not in excess of prices currently being charged any other purchaser of a similar or identical article.

AF 33(038)-2998

(Page Eighteen)

MIL-S-6538(USAF)
30 April 1951

MILITARY SPECIFICATION
SUSTENANCE KIT, HOT CLIMATE, SEAT STYLE, TYPE F-1

1. Scope

1.1 Scope.—This specification covers one type of emergency sustenance kit, designated Type F-1.

2. Applicable Specifications, Other Publications, and Drawings

2.1 The following publications of the issue in effect on date of invitation for bids, shall form a part of this specification to the extent specified herein:

TABLE I

ITEM NO.	DESCRIPTION	IDENTIFICATION	CLASS OR STOCK NO.	QUANTITY
1.	Blades, Razor, Double-Edge	Gillette Safety Razor Co. Boston, Mass., "Blue Blade" Model, or equal		20 each
2.	Canteen Assembly 3 Pt. Capacity	Dwg 4509049	Class 13	1 each
3.	Container Assembly 5 Qt. Capacity	Dwg. 4603007	Class 13	1 each
4.	Compass, Wrist, Non-Liquid, Type L-1	Spec. 21051	Class 05A	1 each
5.	First Aid Kit, C-1 Vest Type	Dwg. 4603085		1 each
6.	Fishing Kit, Survival	MIL-F-6218	Class 13	1 each
7.	Food Packet, Individual, Survival ST-2		QM	2 each
8.	Gloves, Flying, Very Light, Mosquito Resistant, Type L-1	Spec. 3261	Class 13	1 pair
9.	Goggles, Folding	MIL-G-4085	Class 13	1 pair
10.	Hat, Emergency, Reversible, Sun	Dwg. 4405062	Class 13	1 each
11.	Headnet, Mosquito, M-1044	FSN 258	QM 27-H-203	1 each
12.	Insect Repellent (See 3.3.1)	Dwg. 45B9008	Class 13	2 ozs
13.	Jackknife, Utility	MIL-J-818	QM 74-K-65	1 each
14.	Lipstick, Anti-Chap, Type II	JAN-L-651	QM	1 each
15.	Machete, Emergency, Survival, with Sheath	Dwg. 48C3639	Class 17B	1 each
16.	Manual, Survival (Religious Information Included)	64-5	30A	1 each
17.	Mirror, Emergency Signaling, Type B-1	Spec. 41063	Class 03F	1 each

Government's Exhibit No. 13

(Page Twenty)

GOVERNMENT'S EXHIBIT No. 15

(Page One)

DARB FORM 96
OCTOBER 1949
PROMULGATED BY
CIVIL SERVICE COMMISSION
BY FEDERAL PERSONNEL MANUAL

PC HCD

DEPARTMENT OF THE AIR FC

NOTIFICATION OF PERSONNEL ACTION

1. NAME (LAST—FIRST—MIDDLE—ONE COVER NAME, INITIAL(S), AND SURNAME)	2. DATE OF BIRTH	3. ANNUAL OR ACTION NO.	4. DATE
Mr. ROBERT G. HOLLIFIELD	May 20, 1924		Sept. 30, 1950

This is to notify you of the following action affecting your employment:

5. NATURE OF ACTION (USE STANDARD TERMINOLOGY)	6. EFFECTIVE DATE	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
Promotion	Oct. 1, 1950	CS Reg 6.103

	FROM		TO
8. POSITION TITLE	Designer (Aviation Equipage)		Designer Supervisor (Aviation Clothing and Equipage)
9. SERVICE, SERIES, GRADE, SALARY	CB-9, $6725.00 p. a.		79-000-11, $7600.00 p. a.
10. ORGANIZATIONAL DESIGNATIONS	Engineering Division Aero Medical Laboratory Medical Specialties Branch		
11. HEADQUARTERS	WP, AIR MATERIEL COMMAND WRIGHT-PATTERSON AIR FORCE BASE DAYTON, OHIO		
12. FIELD OR DEPT'L	[ ] FIELD RXD-697 [ ] DEPARTMENTAL		[ ] FIELD [ ] DEPARTMENTAL

13. VETERAN'S PREFERENCE						14. POSITION CLASSIFICATION ACTION			
NONE	WWII	OTHER	5-PT.	10-POINT DISAB.	10-POINT OTHER	NEW	VICE	I. A.	REAL.
									X

15. SEX	16. RACE	17. APPROPRIATION	18. SUBJECT TO C. S. RETIREMENT ACT (YES—NO)	19. DATE OF APPOINTMENT AFFIDAVITS (ACCESSIONS ONLY)	20. LEGAL RESIDENCE
		FROM: TO:			[ ] CLAIMED [ ] PROVED STATE:

21. REMARKS: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements.

RXD-2929-A to RXD-69

This action is subject to such revision as may be requir by the provisi ns of

	FROM		TO
8. POSITION TITLE	Designer (Aviation Equipage)		Designer Supervisor (Aviation Clothing and Equipage)
9. SERVICE, SERIES, GRADE, SALARY	CB-9, $6725.00 p. a.		79-000-11, $7600.00 p. a.
10. ORGANIZATIONAL DESIGNATIONS	Engineering Division Aero Medical Laboratory Medical Specialties Branch		
11. HEADQUARTERS	WP, AIR MATERIEL COMMAND WRIGHT-PATTERSON AIR FORCE BASE DAYTON, OHIO		
12. FIELD OR DEPT'L	[ ] FIELD RXD-697 [ ] DEPARTMENTAL		[ ] FIELD [ ] DEPARTMENTAL

13. VETERAN'S PREFERENCE						14. POSITION CLASSIFICATION ACTION			
NONE	WWII	OTHER	5-PT.	10-POINT DISAB.	10-POINT OTHER	NEW	VICE	I. A.	REAL.
									X

15. SEX	16. RACE	17. APPROPRIATION	18. SUBJECT TO C. S. RETIREMENT ACT (YES—NO)	19. DATE OF APPOINTMENT AFFIDAVITS (ACCESSIONS ONLY)	20. LEGAL RESIDENCE
		FROM: TO:			[ ] CLAIMED [ ] PROVED STATE:

21. REMARKS: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements.

RXD-2929-A to RXD-69

This action is subject to such revision as may be requir by the provisi ns of

Public Law 752, 81st Congress and/or the Supplemental Appropriation Act of 1951 and the implementing regulations thereto as issued by the Civil Service Commission.

Payroll No. 607.1

For the Commanding Officer:

ENTRANCE EFFICIENCY RATING: Very Good

E. E. RICHEY
CHIEF, PERSONNEL UNIT

22. SIGNATURE OR OTHER AUTHENTICATION

4. PERSONNEL FOLDER COPY

☆ U. S. G. P. O.: 1949-699100

Government's Exhibit No. 15

(Page Two)

REXD-69

Designer Supervisor (Aviation Clothing and Equipage)

GS 000 11

JESSE AMASS 6-28-50

Headquarters, AMC—Area B

Engineering Division

Aero Medical Laboratory

Medical Specialties Branch

Land Survival Unit

SUPERVISION RECEIVED: Works under general supervision of the Chief, Medical Specialties Branch, with opportunity for wide use of creative initiative and independent judgment in planning and supervising the accomplishment of land survival equipment.

SUPERVISION EXERCISED: Exercises technical and administrative supervision over aproximately four Designers of lower grade. In the absence of the Branch Chief, assumes responsibility for the operation of the Branch.

MAJOR DUTIES:

1. As Chief, Land Survival Unit, formulates unit policy and assists the Branch Chief in establishing Branch policies and procedures. Represents the Laboratory at meetings with the Joint Aircraft Committee, Aeronautical Board, Bureau of Aeronautics and Air-Sea Rescue Board regarding land survival equipment policies.

2. Receives and discusses with supervisor, requirements for land survival equipment assigned to or initiated by the Unit. Considers problem and probable approaches; determines personnel to whom assignment will be made. Evaluates proposed development; reaches estimates with respect to time, facilities, personnel, nature and cost of materials, and initiates Expenditure Order to open project.

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3. Makes assignments to subordinates. Coordinates individual or combined efforts of project designers; supervise, assists, offers aid and advice and constructive criticism. Maintains liaison with other laboratory branches, and other laboratories, to insure that survival equipment developed will not conflict with the use or operation of other equipment in aircraft or on crew members.

4. Reviews and discusses first samples produced to eliminate or concentrate on design ideas with respect to functional suitability; to determine compliance with specifications and drawing requirements. Approves and coordinates the planning and accomplishment of experimental design tests.

5. Supervises, reviews and approves tentative specifications prepared by subordinates to determine that requirements are adequate. Reviews reports of subordinates for validity and accomplishment of objectives. Receives and initiates or coordinates correspondence to and from AMC Laboratories, other government agencies and indu-

(Page Three)

trial organizatons relating to research, development, procurement, inspection, or pre-standardization testing of assigned projects, in order to keep abreast of new trends in materials.

6. Prepares monthly and quarterly reports reflecting project status. Evaluates laad survival eqaipment requirements and suggestions received from other AMC activities, other commands, industry, or inventors and initiates action to investigate and/or activate development.

7. Personally designs or develops personal survival kits in addition to other duties.

8. Performs other duties as designated.

Hollifield, Robert G.

GOVERNMENT'S EXHIBIT No. 17

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MIL-S-6216(USAF)
24 August 1950

MILITARY SPECIFICATION
SUSTENANCE KIT, INDIVIDUAL, LONG RANGE, TYPE E-1

1. SCOPE AND CLASSIFICATION.

1.1 SCOPE.—This specification covers one type of sustenance kit, designated Type E-1.

2. APPLICABLE SPECIFICATIONS, OTHER PUBLICATIONS, AND DRAWINGS.

2.1 The following specifications, bulletin, and drawings of the issue in effect on date of invitation for bids, shall form a part of this specification to the extent specified herein:

2.1.1 SPECIFICATIONS:

FEDERAL:

K-S-416	Skin; Chamois

MILITARY:

JAN-S-48	Socks, Wool, Cushion-Sole, O.D.
JAN-P-105	Packaging and Packing for Overseas Shipment—Boxes; Wood, Cleated, Plywood
JAN-P-106	Packaging and Packing for Overseas Shipment—Boxes; Wood, Nailed
JAN-P-108	Packaging and Packing for Overseas Shipment—Boxes; Fiberboard, (V Board and W-Board), Exterior and Interior
JAN-B-121	Barrier-Materials, Greaseproof
JAN-P-125	Packaging and Packing for Overseas Shipment—Barrier-Materials, Waterproof, Flexible

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FEDERAL:

JAN-P-139	Packaging and Packing for Overseas Shipment—Plywood: Container Grade
JAN-P-140	Packaging and Packing for Overseas Shipment—Adhesives, Water-Resistant, Case-Liner
JAN-F-284	Forks, Knives, and Spoons, M-1926
JAN-S-405	Socks, Wool, Winter
JAN-L-655	Lipstick, Anti-Chap and Sunburn-Protective
MIL-J-818	Jackknife, Utility
MIL-B-830	Bags, Sleeping M-1949
JAN-G-1134	Goggles, Ski-Mountain
MIL-F-6218	Fishing Kit, Survival
MIL-C-6235	Compass, Pocket, Survival
MIL-R-6238	Raincoat, Survival Kit
MIL-B-6260	Boot-Mukluk, Man's Survival Kit

Government's Exhibit No. 17
(Page Four)

Item No.	Description	Identification	Quantity
11.	Container, Bail-Out, Quick Attachable, Individual Emergency Survival.	Dwg. 50J3944.	1 each
12.	File, Flat, Smooth, Six Inch.	Commercial.	1 each
13.	Fishing Kit, Survival,	Spec. MIL-F-6218	1 each
14.	First Aid Kit, C-1 Vest Type.	Dwg. 46D3085.	1 each
15.	Food Packet, Individual, Survival, SA-1	AF S/N 6780-285000	6 each
16.	Fuel, Ration Heating.	Sterno Corp., N.Y., N.Y., Part No. 4006, or equal.	2 cans
17.	Gloves, Air Crew, Mitten Style, Knitted Wool, Type M-3.	Spec. 3260.	1 pair
18.	Gloves, Air Crew, Mitten Style, Leather, Type M-2.	Spec. 3259.	1 pair
19.	Glove, Flying, Inner, Intermediate, Nylon - size large.	Spec. AN-G-26.	1 pair
20.	Goggle, Ski-Mountain, Type I.	Spec. JAN-G-1134	1 each
21.	Headnet, Mosquito, M-1944.	Spec. PQM58.	1 each
22.	Insect Repellent.	Dwg. 45B9008.	1 can
23.	Jackknife, Utility.	Spec. MIL-J-818	1 each
24.	Knife, Hunting - Except blade shall not be chrome plated, edge to be factory ground and a 3/16 dia. hole to be drilled off center in cap on handle.	Boker and Co., N.Y., N.Y., Part No. 155, modified as noted, or equal.	1 each
25.	Lipstick, Antichap - Type I.	Spec. JAN-L-655.	1 each
26.	Magazine - for M-4(T-38) Rifle. (See Section 6)	Harrington and Richards Arms Co., Part No. 294-61 or equal	1 each
27.	Manual, Survival, 64-0-1, USAF.		1 each
28.	Matches, Ordinary Kitchen Type - (Strike Anywhere), 200 per roll (See 3.3.3)	Commercial.	2 rolls
29.	Mirror, Emergency Signalling Type B-1	Spec. 41063.	1 each
30.	Monocular, with Case.	Argus, Inc., Ann Arbor, Mich., Part No. 83001, or equal.	1 each
31.	Net, Gill - 15 feet long by 3-1/2 feet deep, 2 inch stretched measure (1 inch square mesh), hung 4 meshes to a 4 inch tie on a medium twine (breaking strength in excess of 70 pounds) without floats and leads, but hung complete, all nylon.	Commercial.	1 each
32.	Oiler, Carbine, Cal. .30, M-1 (See Section 6)	ORD.	1 each
33.	Plotter, Aircraft, Weems, Type 2.	Weems Co., Annapolis, Md., or equal.	1 each
34.	Raincoat, Survival Kit.	Spec. MIL-R-6238.	1 each
35.	Razor, Safety.	Pak Co., Cleveland, Ohio "Travalong" model, or equal.	1 each
36.	Rifle, Survival, M-4 (T-38). (See Section 6)	ORD.	1 each

GOVERNMENT'S EXHIBIT No. 18

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JAN-G-1134

24 June 1949

NATIONAL MILITARY ESTABLISHMENT SPECIFICATION GOGGLES, SKI-MOUNTAIN

This specification was approved by the Departments of the Army, the Navy, and the Air Force for use of procurement services of the respective Departments, and supersedes the following specification:

Quartermaster Corps
Tentative Specification
JQD 93B
4 September 1942

This specification consists of this cover sheet and Specification JQD 93B dated 4 September 1942 and Amendment 2 dated 17 May 1945, attached hereto, without modification.

Copies of this specification may be obtained from the QM Research and Development Laboratories, Jeffersonville Quartermaster Depot, Jeffersonville, Ind.

When a request for this specification is received by a supplying activity it will be necessary to attach this cover sheet to the pertinent specification before issue.

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QUARTERMASTER CORPS
TENTATIVE SPECIFICATION

J. Q. D. No. 93B
September 4, 1942
Superseding
J. Q. D. No. 93A
July 15, 1942

GOGGLE, SKI-MOUNTAIN.

A. Applicable Specifications.

A-1. The following specifications of the issue in effect on date of invitation for bids shall form a part of this specification:

A-1a. Federal Specifications.—
NN-B-601—Boxes; wood, cleated-plywood.
NN-B-621—Boxes; wood, nailed and lock-corner.

A-1b. United States Army Specifications.—
6-185—Webbing, cotton, natural or in colors.
100-2—Standard specifications for marking shipments.

B. Type and Size.

B-1. Type.—This specification covers a goggle for use by mountain and ski troops, constructed as to afford the maximum of protection to the eyes against wind and snow blindness brought on by glare or broad snowfields or at high altitudes. Goggle must have general dull finish for low reflection.

B-1a. As set forth in invitation for bids, contract or order, the completed goggle herein specified shall be supplied with one or more pair of the following types of lenses:

Type I, laminated glass lens, as hereinafter specified.

Type II, heat treated glass lens, as hereinafter specified.

Type III, cellulose acetate sheet plastic lens, with green tint color added, as hereinafter specified.

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B-2. SIZE.—This specification covers one size of goggle with adjustable features for fitting a normal range of individual facial characteristics.

C. MATERIAL AND WORKMANSHIP.

C-1. MATERIALS.—

C-1a. When materials are used which are not specifically designated they shall be entirely suitable for their intended purpose.

C-1b. Materials shall be such as to combine mechanical strength and lightness of weight. Materials shall be non-irritating to the skin when subjected to perspiration.

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shape to prevent chafing of nose, the bridge to be made adjustable with a serrated slide buckle to fit a normal range of pupilary distances. The lens frame to have a substantial device, welded, hard soldered or riveted to frame for attaching the leather strap for bridge without lateral motion and so positioned as to properly align goggle. (See figures 1, 3 and 5.)

E-1c. EYECUP.—The eyecup to be of spring type, with hard woven permeable cotton fabric screen construction over wire frame and to be bound with a soft edging of wire cored chenille about $\frac{3}{8}$" in width of edges contacting face of wearer. The fabric used is to have a plain weave, single yarn in both warp and filling, and when finished and dyed to have a texture of 38 ends and 36 picks minimum and weighing approximately 4.5 oz. per square yard. Pattern of fabric is to be cut on diagonal so that it will give a knitted effect when assembled to the eyecup. The cloth and binding to be olive drab in color. Rim of each lens frame to have welded, hard-soldered or riveted prong located approximately in line with headband and at outer or inner side to secure eyecup inside of frame. Eyecup to be approximately $\frac{1}{2}$" deep at nose

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bridge point and gradiated up approximately 1½" at temple point so as to be anatomically shaped to fit the average face (See Figures 1, 2, 3 and 5.). Each eyecup shall have a chrome tanned cape or calf leather section approximately 1" x 1", securely fastened at the temple point for alignment and provided with a suitable reinforced slot for attaching the replaceable headband for holding goggle in proper position on the face of the wearer.

E-1d. VENTILATION.—Each eyecup shall be adequately ventilated by an opening in the fabric made by omitting the fabric screen over the wire framework for approximately 1½", both above and below the nose bridge. (See figures 2 and 3 and 5).

E-1e. HEADBAND.—The goggle shall be equipped with a good grade of cotton webbing and elastic webbing three piece headband for holding goggle comfortably and tightly in proper position on the wearer's face. (See Figure 5). The construction of the cotton webbing on the headband shall be in accordance with the requirements for Type I, light weight specified in Table I of United States Army Specification 6-185. The headband shall be adjustable as to length with open type slide buckles and easily replaceable. The headband shall be of a suitable length and width but in no case less than ½" in width. The two cotton web portions being not less than 8" each in effective length and the elastic web portion not less than 8" in effective length.

E-1f. All metal parts of the goggle shall be finished with a dull, black, baked enamel to provide surfaces of low reflecting power.

E-1g. LENSES.—The lenses each type are to be sage green or blue green, and shall not appreciably distort color values and shall be as hereinafter specified. Each type lens shall be substantially the same color. The lens shall be non-polarizing.

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E 1g(1). Lenses Type I, II and III shall have a visual transmission of total visible rays of 13.9% to 20%. The lens of a pair shall have the same total visual transmission within 20% of the standard transmission.

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E-1g(2). The transmission of ultra violet radiation by the lens Type I, II and III at 365 millimicrons or shorter, shall not be over 0.5%.

E-1g(3). Lenses Type I, and II shall have a maximum total transmission of infra red rays of 9%.

E-1g(4). The optical surface of the lenses Type I, II and III, shall not be effectively out of parallel by more than four minutes of arc (0.058 prism diopter). Glass lenses shall not have a positive or negative refractive power in any meridian greater than 0.0625 diopter, and shall not have a greater refractive power between any two meridians greater than 0.05 diopter. The refractive or prismatic power of the plastic lens shall not exceed 0.25 diopter.

E-1g(5). The lens shall be free from dirt spots, superficial inclulations, lenticulations, visible or effective striae, inclusions, bubbles, scratches, waves, aberrations or any other undesirable visula properties or optical qualities. All lenses shall be suitable for continuous use by the wearer without discomfort or optical impairment to the normal eye.

E-1g(6). The Type I lens shall be colored, laminated, non-shatterable, flat, ground and polished glass. Shall be of shape and size as illustrated in Figure 4 and shall fit tightly and evenly into frame herein specified.

E-1g(6a). The laminated material of the lens shall be such as not to disintegrate in the sunlight and retain non-shatterable qualities at minus 40°F. and to be moisture sealed. The edges of the lens shall be beveled to a

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crown free from cracks, sharp edges or roughness and dull finished.

E-1g(7). The Type II lens shall be heat treated so as to be non-shatterable and resistant to impact. The lens shall be colored glass, ground and polished and shall be of shape and size as illustrated in Figure 4 except that thickness should be 3.3 mm plus or minus 0.3 mm and shall fit tightly and evenly into frame herein specified.

E-1g(7a). Type II lens shall be tested by manufacturer under Polarized light to determine adequacy of heat treatment. Edges of lens shall be leveled to a crown free from cracks, sharp edges or roughness and dull finish.

E-1g(8). The Type III lens shall be blanked or cut from smooth uniform surface cellulose acetate sheet plastic material of same requirements as glass lenses except for infra red absorptive powers. The plastic lens to be 0.030" plus or minus 0.002" or 0.034" plus or minus 0.003" thick and of same size and shape as to be interchangeable with glass lens and to fit tightly and evenly when inserted in frame herein specified.

E-1g(8a). Plastic material shall be a slow burning type of a quality at least equal to commercial grades and rigidity free from opaque particles and scratches or other surface defects. The edges of the lens shall be a cut and blank edge finish and free from cracks or objectionable roughness. Defects which are within 3/16" of the edges of the lens shall not be the cause for rejection.

GOVERNMENT'S EXHIBIT No. 19

(Page One)

MIL-S-5775A(USAF)
28 August 1950
Superseding
MIL-K-5775(USAF)
7 April 1950

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MILITARY SPECIFICATION
SUSTENANCE KIT, EMERGENCY, AIRCRAFT TYPE D-1

1. SCOPE AND CLASSIFICATION.

1.1. SCOPE.—This specification covers one type of emer •gency sustenance kit, designated Type D-1.

2. APPLICABLE SPECIFICATIONS, OTHER PUBLICATIONS, AND DRAWINGS.

2.1 The following specifications, bulletin, and drawings of the issue in effect on date of invitation for bids, shall form a part of this specification to the extent specified herein:

2.1.1 SPECIFICATIONS:

2.1.1.1 FEDERAL:

QQ-W-321	Wire; Brass

2.1.1.2 MILITARY:

JAN-S-48	Socks, Wool, Cushion Sole, O.D
JAN-P-105	Packaging and Packing for Overseas Shipment—Boxes; Wood, Cleated, Plywood
JAN-P-106	Packaging and Packing for Overseas Shipment—Boxes; Wood, Nailed
JAN-P-108	Packaging and Packing for Overseas Shipment—Boxes; Fiberboard, (V Board and W Board), exterior and Interior

• Indicates changes in this revision over the previous issue.

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	JAN-P-125	Packaging and Packing for Overseas Shipment—Barrier Materials, Waterproof, Flexible
	JAN-P-140	Packaging and Packing for Overseas Shipment—Adhesives, Water Resistant, Case-Liner
*	JAN-P-284	Forks, Knives, and Spoons, M-1926
*	MIL-J-818	Jackknife, Utility
*	MIL-P-3003	Poncho, Lightweight, C. D.
	MIL-G-4085	Goggles, Folding
*	MIL-P-5374	Parachute, Cargo, Type G-8

2.1.1.3 Air Force-Navy Aeronautical

	Tape: Adhesive Moisture Resistant
AN-W-22	Wire: Zinc Coated Soft Metal

2.1.1.4 U. S. Air Force:

3261	Glove, Flying, Very Light, Mosquito Resistant, Type K-1
21051	Compass: Wrist, Non-Liquid, Type L-1
41036	Kit: Medical, Emergency, Type TT-1
41063	Mirror: Emergency Signalling, Type B-1

* Indicates changes in this revision over the previous issue.

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Item No.	Description.	Specification or Drawing	Responsible Service	Stock No. or Class No.	Quantity
1.	Brush, Tooth, Nylon Bristle		QM	29B3150	3
2.	Can, Insect Repellent	45B9008	USAF	13	3
3.	Candle, Wax (1-1/4 Inches Diameter by 5 Inches Long)		QM	51C596-70	2
4.	Compass, Wrist, Non-Liquid, Type L-1	21051	USAF	05A	1
5.	Container, Water, 5-Quart Capacity, Part No. 46G3007-1	46G3007	USAF	03F	1
6.	Container, Type A-13	46G3207	USAF	20	1
7.	Cup, Corrosion Resisting, 10 Ounce Capacity, Nesting	46D3065	USAF	03F	3
8.	Double-Edge Blades		QM	29B1756	10
9.	File, Flat, Smooth, 6-Inch		USAF	17B	1
10.	Glove, Flying, Very Light, Mosquito Resistant	3261	USAF	13	3 pr.
11.	Goggles, Sun, Type I	MIL-G-4085	USAF	13	3
12.	Gun, Carbine, Calibre .30, M1A1		ORD	B001-0007672	1
13.	Hat, Reversible, Sun	44G5062	USAF	13	3
ø 14.	Headnet, Mosquito, M-1944	PQD458	QM	27-H-203	3
ø 15.	Jackknife, Utility	MIL-J-818	QM	74-K-65	1
16.	Kit, Medical, Type TT-1	41036	USAF		1
17.	Kit, Vest Type Emergency Fishing	44B9156	USAF	13	1
18.	Machete, Folding	48C3639	USAF	17B	1
19.	Manual, Emergency Uses of Parachute, USAF Manual 64-15		USAF	30	1
20.	Manual, Survival, AFM 64-5		USAF	30	1
21.	Mirror, Emergency Signalling, Type B-1	41063	USAF	03F	1
22.	Ointment, Sun Protective, Eli Lilly Preparation No. 69, 120 Gram Tube		USAF	13	1
ø 23.	Parachute, Type G-8, International Orange Canopy	MIL-P-5374	USAF	20	1
24.	Poncho, Lightweight, O. D.	MIL-P-3003	QM	72P97180	1
25.	Razor, Safety, Gillette Type		QM	29R1040	1
ø 26.	Salt - 2 Ounce Cardboard Salt Shaker, Diamond Crystal Salt Co., or equal				4
27.	Soap, Toilet, Soft, Hard or Sea Water	22-275	QM	5181893	3
28.	Socks, Wool, Cushion Sole, O. D. 1 Pair Size 11 2 Pair Size 13	JAN-S-48	QM	 73831828 73831836	3 pr.
29.	Snare, Game, Part No. 1-XX, Raymond Thompson Co., Seattle, Wash., or equal		USAF		1
30.	Spoons, Stainless Steel, M-1926	JAN-P-284	QM	748312	3
31.	Stone, Sharpening, Pocket, 3-1/2 x 3/4 x 3/4		USAF	17B	1
32.	Whistle, Police, Plastic	7401	USAF	29	1
33.	Wire, Brass (0.025 Inch) Condition B, Annealed	QQ-W-321	USAF	23A	20 ft.

GOVERNMENT'S EXHIBIT No. 20

(Page One)

MIL-G-4085(USAF)
21 March 1950
Superseding
No. 3227
31 August 1944
and
No. 94-3142
28 January 1944

MILITARY SPECIFICATION
GOGGLES, FOLDING

1. SCOPE AND CLASSIFICATION.

1.1 Scope. This specification covers two types of goggles as follows:

Type I—Glare Protective
Type II—Dark Adaptation

2. APPLICABLE SPECIFICATIONS, OTHER PUBLICATIONS, AND DRAWINGS.

2.1 The following specifications and bulletin of the issue in effect on date of invitation for bids shall form a part of this specification to the extent specified herein:

2.1.1 SPECIFICATIONS:

2.1.1.1 FEDERAL:

KK-L-254	Leather; Sheepskin, Chrome-Tanned

2.1.1.2 MILITARY:

JAN-P-105	Packaging and Packing for Overseas Shipment—Boxes, Wood, Cleated, Plywood
JAN-P-106	Packaging and Packing for Overseas Shipment—Boxes, Wood, Nailed
JAN-P-108	Packaging and Packing for Overseas Shipment—Boxes, Fiberboard (V-Board and W-Board) Exterior and Interior

Government's Exhibit No. 20

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JAN-P-139	Packaging and Packing for Overseas Shipment—Plywood, Container Grade

2.1.1.3 Air Force-Navy Aeronautical

AN-P-84	Plastic; Cellulose Acetate Base Sheet
AN-DDD-T-91	Tape; Cotton Reinforcing
AN-W-15	Webbing; Elastic Cotton

2.1.1.4 U. S. Army:

94-40645	Marking, Exterior, Domestic and Export Shipment, by Contractors

(Page Four)

MIL-G-4085(USAF)

3.3 Headband.—An adjustable elastic headband, as shown in Figure 1, shall be securely fastened to the goggles. Not more than two thirds of the headband shall be cotton tape with the balance of the headband constructed of elastic webbing. The headband shall be adjustable from a minimum length of 12.5 inches to a maximum of 17.5 inches. The tape and elastic webbing shall be 3/8 inch wide. A simple hook fastener shall be provided.

3.4 Lens.—Lenses shall be cut from cellulose acetate sheet, 0.030 inch plus 0.003 or minus 0.002 inch thick.

3.4.1 Lenses shall be free from bubbles, imbedded particles and defects which cause more than five minutes angular deviation in light rays normal to the surface.

3.4.2 The power of any lens shall not exceed 1/12 diopter in any meridian, and there shall be not more than 1/12 diopter difference of power in any meridian.

3.4.3 The size and shape of the lenses and their position in the goggles shall be such that a binocular field of fixation not less than 20 degrees in any meridian shall be provided. Auxiliary side lenses shall be provided to allow peripheral vision of at least 180 degrees.

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3.4.4 Light Transmission:

3.4.4.1 The daylight transmission of the Type I lens shall be 15 plus or minus 3 per cent when computed as shown in Table I, and the chromaticity coordinates shall fall within the area indicated in Figure 2.

3.4.4.2 The daylight transmission of the Type II lens shall not be less than six per cent when computed as shown in Table I. The lenses shall transmit no light of wave length less than 580 millimicrons and the transmission at 600 millimicrons shall not exceed ten per cent.

3.4.5 Matching.—The two pair of lenses mounted in each pair of goggles shall be matched in total visible transmission within 20 per cent of the higher of the pair.

3.5 Goggle Case.—Each pair of goggles shall be furnished with a cotton fabric goggle case. The goggle case shall be open at one end for insertion of the goggles and shall be of such dimensions that it will accomodate the folded goggles neatly and snugly.

3.6 Marking:

3.6.1 The following information shall be marked on the outside surface of the frame in letters approximately $\frac{1}{8}$ inch high:

Spec. MIL-G-4085
Type (I or II, as applicable)
Manufacturer's Name or Trademark

3.7 Workmanship.—Goggles shall be finished in a thoroughly workmanlike manner. Finished goggles shall be clean and free from any defects that might affect appearance or functionability.

TABLE I

Daylight transmittance, T_D, and chromaticity coordinates, x and y, for standard illuminant C. (The lens used for this worked example is Bausch and Lomb neutral glass.) The symbol "T" stands for spectral transmittance, the ratio of transmitted to homogeneous radiant flux.

Wave Length (Millimicrons)	$\bar{x}$	$\bar{y}$	$\bar{z}$	T	X	Y	Z
380	4		20	0.104	0	0	2
90	19		89	0.240	5	0	21
400	85	2	404	0.301	26	1	122
10	389	9	1570	0.275	90	2	432
20	1238	37	5949	0.174	215	6	1035
30	8997	122	14628	0.110	330	13	1609
40	3975	262	19938	0.093	370	24	1854
450	3915	443	20638	0.092	360	41	1899
60	3362	694	19299	0.100	336	69	1930
70	2272	1058	14972	0.110	250	116	1647
80	1112	1618	9461	0.122	136	197	1154
90	363	2358	5274	0.132	48	311	696
500	52	3401	2864	0.140	7	476	401
10	89	4833	1520	0.142	13	686	216
20	576	6462	712	0.142	82	918	101
30	1583	7934	388	0.141	215	1119	55
40	2785	9149	195	0.141	393	1290	27
550	4282	9832	86	0.155	664	1524	13
60	5880	9841	39	0.170	1000	1673	7
70	7322	9147	20	0.167	1223	1528	3
80	8417	7992	16	0.153	1288	1223	2
90	8984	6627	10	0.142	1276	941	1
600	8949	5316	7	0.136	1217	723	1
10	8325	4176	2	0.136	1132	568	0
20	7070	3153	2	0.137	969	432	
30	5309	2190		0.137	727	300	
40	3693	1443		0.138	510	199	
650	2349	886		0.150	352	133	
60	1361	504		0.188	256	94	
70	708	259		0.270	191	70	
80	369	134		0.368	136	49	
90	171	62		0.475	81	29	
700	82	29		0.576	47	17	
10	39	14		0.680	24	9	
20	19	6		0.636	12	4	
30	8	3		0.643	5	2	
40	4	2		0.648	3	1	
750	2	1		0.632	1	1	
60	1	1		0.620	1	1	
70	1			0.600	1	0	
				Totals	13992 (X)	14790 (Y)	13228 (Z)

$X = \bar{x}T$, $Y = \bar{y}T$, $Z = \bar{z}T$

Daylight transmittance, $T_D = Y/1000 = 14.8$ per cent

Chromaticity coordinates:

$x = X/(X + Y + Z) = 13992/(13992 + 14790 + 13228) = 0.3331$

$y = Y/(X + Y + Z) = 14790/(13992 + 14790 + 13228) = 0.3521$

GOVERNMENT'S EXHIBIT No. 21

(Page One)

WAR DEPARTMENT STANDARD FORM

REQUEST FOR PROPOSAL AND CONTRACTOR'S PROPOSAL
(Long Form)

Important Notice to Contractor. Only the following designated portions of this form are to be completed:

TITLE I
AF-17438

TITLE II, III and Cost Analysis

Date 4 October, 1950

..... No. RFP 51-51

PROCUREMENT OFFICE: AF, Air Materiel Command
Wright-Patterson Air Force Base, Dayton, Ohio

Buyer: Lt. J. Mitchell, MCPPXG-43
Phone: KEnmore 7111, Ext. 2-8135

P.R. No. 119443
MCMSXC

Subject: (Item or Items): KIT

(Item 1)

Class 13-C

REQUEST FOR PROPOSAL

1. Contractor is requested to submit a proposal for the furnishing of the items described or referred to in Title II (or such quantities as the contractor may be able to furnish), upon the delivery schedule specified in Title II, upon the understanding that the Government will furnish any materials described in Title II (D) 1, and in accordance with Contract Form 32, as amended to date of the proposal, including (a) all applicable provisions required by Federal law, Executive Orders, and War Department Procurement Regulations, and (b) the following additional clauses: as indicated herein:

Government's Exhibit No. 21

(Page One)

A copy of that form of contract, with such provisions and clauses, may be obtained from this office.

2. The award of the particular contract will normally be made to the low bidder, but the War Department reserves the right to negotiate with any bidder or other producer and to reject any and all quotations received.

3. Offers of discounts for prompt payment or cash will be considered in determining which of the bids received is the lowest.

4. Three (3) copies of this form are to be completed, signed, and returned to this office on or before 19 October, 1950. In any event all the drawings and specifications are to be returned to this office by that date, unless instructions to the contrary are issued by the contracting officer. In completing this form, please follow carefully the enclosed instructions.

CLAUDE W. COLLINS,
Contracting Officer.

Enclosures:
Instructions. 1
4 Copies of War Department Standard Form.

(Page Two)

CONTRACTOR'S PROPOSAL.

1. Pursuant to the foregoing Request for Proposal, the undersigned hereby offers to furnish to the Government the items, in the quantities, at the prices, upon the delivery schedules, and in strict accordance with the specifications, all referred to in Title II.

2. The Government's notice of acceptance of this proposal must be given within 10 days after the return date specified in said Request for Proposal, by sending to the undersigned, by mail or otherwise, a notice of award, purchase order, or contract responsive to this proposal.

3. In the event the Government shall accept this pro-

Government's Exhibit No. 21

(Page Two)

posal, the undersigned will sign and deliver to the Government the form of contract referred to in said Request for Proposal (if that form requires manual execution by the undersigned), and embodying the terms and provisions of this proposal, subject to the following conditions:

4. Contractor certifies that the prices quoted herein are not in excess of any applicable O. P. A. price regulations.

5. Any acceptance of this proposal will be based on the following representations (including the data furnished by the undersigned on the specified portions of this form and 2 supplementary sheets attached hereto), which are certified to be true to the best knowledge and belief of the undersigned (elsewhere in this form called the "contractor").

Date: October 18, 1950

Name: S. Buchsbaum & Company
1737 South Michigan Avenue
Chicago 16, Illinois
By Emanuel V. Buchsbaum
Title: Treasurer

TITLE 1.—(a) Contractor is:

(X) Corporation, incorporated under laws of Illinois.
( ) Partnership, consisting of .....
( ) Sole proprietorship of .....

(b) Business address: 1737 South Michigan Ave., Chicago 16, Illinois.

(c) Telephone No.: WAbash 2-1600.

(d) Name and location of contractor's plants where each item will be manufactured or from which furnished: 1550 South Indiana Ave., Chicago, Ill.

(e) Contractor now employs approximately 495 wage earners.

(f) The individual authorized to conduct negotiations on behalf of contractor is: Emanuel V. Buchsbaum: Title: Treasurer.

Government's Exhibit No. 21

(Page Four)

10-18-50

ESTIMATE PROCUREMENT MATERIALS FOR KIT—EMERGENCY SUSTENANCE TYPE D-1

ITEM	DESCRIPTION		PRICE
1	Brush, Tooth, Nylon Bristle		G.F.E.
2	Can, Insect Repellant	(3)	.75
3	Candle, Wax		G.F.E.
4	Compass, Wrist, Non-Liquid Type L-1		3.85
5	Container, Water, 5 Quart		G.F.E.
6	Container, Type A-13		
7	Cup, Corrosion Resisting 10 oz. capacity	(3)	3.60
8	Double-Edge Blades		G.F.E.
9	File, Flat, Smooth 6"		.25
10	Glove, Flying, Very Light, Mosquito Resistant	(3)	6.51
*11	Goggles, Sun Type 1	(3)	2.25
12	Gun, Carbine, Cal.		G.F.E.
13	Hat, Reversible, Sun	(3)	3.75
14	Headnet, Mosquito		G.F.E.
15	Jackknife, Utility		G.F.E.
16	Kit, Medical Type TT-1 (Buschbaum make		2.58
17	Kit, Vest Type Emergency Fishing		3.75
18	Machete, Folding		G.F.E
19	Manual, Emergency Use of Parachute		G.F.E.
20	Manual, Survival		G.F.E.
21	Mirror, Emergency Signalling		G.F.E.
22	Ointment, Sun Protective		G.F.E
23	Parachute, Type G-8, International Orange Canopy		17.45
24	Poncho, Lightweight O.D.		G.F.E.
25	Razor, Safety		G.F.E
26	Salt—2oz. Cardboard Salt Shaker		.12
27	Soap, Toilet, Soft Hard or Sea Water	(3)	.30

*(11)
Type No. 3, Stock No. 74-G-76-35
Approved by Engineering Laboratory

TABLE II—(A) SCOPE OF PROPOSAL

REF 51-51

F. O. B. POINT

TO BE FILLED IN BY CONTRACTOR

Item No. (1)	Description of Item (2)	Quantity (3)	Unit (4)	Delivery Required		Price	
				Date (5)	Quantity (6)	Unit (7)	Total (8)
1	Kit - Emergency Sustenanco aircraft Basic Type D-1 Spec. MIL-S-5775a dtd 28 August 50 S/N 8330-559219.	2,500	ea.			$65.88	$164,700.00

Government's Exhibit No. 21

(Page Four)

ITEM	DESCRIPTION	PRICE
28	Socks, Wool	G.F.E.
29	Snare, Game, Part No. 1-XX	.27
30	Spoons, Stainless Steel	G.F.E.
31	Stone, Sharpening	.1625
32	Whistle, Police Pastic	.102
33	Wire Brass (.025") Condition B. Annealed (20 ft.)	.035
		$54.98

GOVERNMENT'S EXHIBIT No. 22

(Letterhead)

S. BUCHSBAUM & CO.

January 8, 1951

Commanding General
Air Materiel Command
Wright-Patterson Air Force Base,
Dayton, Ohio

Attention: Lieutenant J. Mitchell
MCPPXG-43

REF: 33(038)-18136—DI Kits

Gentlemen:

In the manufacturing and assembly of the DI Kits, we ask permission to use the following merchandise which is guaranteed to meet all Government specifications and is in first class condition—which of course will be subject to the inspection of the Air Force Inspector.

Item No. 9 File Flat Smooth. (1 only required to each kit) File to be the same as the attached sample. We want approval as to whether or not this file is satisfactory as to the word "smooth."

Item No. 11 Sun Goggles-Type I (3 pair of goggles to each kit) We ask permission to use Sun Goggles as per the attached samples that have been made in accordance with Specifications 74-G-76-35 and 74-G-76-38.

Item No. 13 Sun Hat, Peversible (3 hats required to each kit) Sun Hats that have been made in accordance with Specification 44-G5062, O.D. on one side, yellow on the other. See attached sample.

Item No. 32 Whistle Police, Plastic (1 only whistle to each kit) We ask permission to use whistle as per attached sample, which has been manufactured in accordance with U. S. Navy specifications. Each whistle comes complete with a chain attachment.

The above materials will be furnished on this contract without additional cost or without any change in the contract price.

Government's Exhibit No. 22

Thanking you for advising us further concerning this matter, we are

Yours very truly,

S. Buchsbaum & Co.
Chester Buchsbaum
President

CB:S

GOVERNMENT'S EXHIBIT No. 23

(Letterhead)

S. BUCHSBAUM & CO.

January 8, 1951

Commanding General
Air Materiel Command
Wright-Patterson Air Force Base,
Dayton, Ohio

Attention: Lieutenant J. Mitchell
MCPPXG-43

REF: 33(038)-17438—DI Kits

Gentlemen:

In the manufacturing and assembly of the DI Kits, we ask permission to use the following merchandise which is guaranteed to meet all Government specifications and is in first class condition—which of course will be subject to the inspection of the Air Force Inspector.

Item No. 9 File Flat Smooth. (1 only required to each kit) File to be the same as the attached sample. We want approval as to whether or not this file is satisfactory as to the word "smooth."

Item No. 11 Sun Goggles Type 1 (3 pair of goggles to each kit) We ask permission to use Sun Goggles as per

Government's Exhibit No. 27

the attached samples that have been made in accordance with Specifications 744-76-35 and 744-76-38.

Item No. 13 Sun Hat, Reversible (3 hats required to each kit) Sun Hats that have been made in accordance with Specification 44-G5062, O.D. on one side, yellow on the other. See attached sample.

Item No. 32 Whistle Police, Plastic (1 only whistle to each kit) We ask permission to use whistle as per attached sample, which has been manufactured in accordance with U. S. Navy specifications. Each whistle comes complete with a chain attachment.

The above materials will be furnished on this contract without additional cost or without any change in the contract price.

Thanking you for advising us further concerning this matter, we are

Yours very truly,

S. Buchsbaum & Co.
Chester Buchsbaum
President

CB:S

Handled by Capt. J. Mitchell

GOVERNMENT'S EXHIBIT No. 24

HEADQUARTERS

AIR MATERIEL COMMAND

Wright-Patterson Air Force Base
Dayton, Ohio

In reply address both communication and envelope to commanding General, Air Materiel Command, attention following office symbol:
MCPPXG43/JM/em
Ext 28135

12 February 1951

SUBJECT: Contracts AF 33(038)-17438 and AF 33(038)-18136

TO: S. Buchsbaum & Company
1737 South Michigan Avenue
Chicago 16, Illinois

1. The following list of samples submitted for approval as components of the D-1 Survival Kit, are hereby approved:

a. File, Flat, Smooth, 6-inch.
b. Goggle, Sun, Type I.
c. Hat, Sun, Reversible.
d. Whistle, Police, Plastic.

2. Any samples that were submitted for approval not covered here will be forthcoming upon receipt of same from the Aero Medical Laboratory.

ROBERT E. ADAMS
Contracting Officer

cc: Chicago AFPFO

GOVERNMENT'S EXHIBIT No. 25

(Page One)

ROUTING AND RECORD SHEET

CONTRACT FILES

Subject: Contracts AF 33(038)-18186 and AF 33(038)-17468, S. Buchsbaum & Company

TO: MCREKID7 FROM: MCPPEDES DATE: 11 Jan 51 COMMENT NO. 1

Attn: Mr. Mullifield

1. Request that attached letters and components be reviewed and your recommendations returned to this office.

Encls
Ltrs & Comp Lab

LOREN P. SCOLIAY
Colonel, USAF
Chief, Research & Material Section
Procurement Division

JM/cm
28156
Bldg 163
Rm 216

TO: MCPPED-43 FROM: MCREKID-72 5 Feb 51 2

1. The following recommendations on sample items submitted, and substitutions proposed by S. Buchsbaum & Company to subject contracts, are forwarded to your office for transmittal and/or appropriate contract changes. (Specification MIL-S-5775A):

a. Item No. 28: Delete "Salt - 2 ounce Cardboard Salt Shaker, Diamond Salt Company, four (4) each", and substitute "Salt, Granular, Iodized, Unit-Service Packet, Diamond Salt Company, or equal, fifty (50) each", and "Salt Tablets, Federal Specification SS-S-31C, Type III, Class B, one-hundred (100) each." The contractor will be required to furnish salt tablets boxed with the following nomenclature and directions printed or typed on a label affixed to the box:

"SALT TABLETS, 100 EACH
Federal Spec. SS-S-31C
Type III, Class B

WARNING - If you are not perspiring freely, or do not have plenty of water, do not use these tablets.

Usage: Two tablets with every pint of water under above conditions."

b. Item No. 2: Delete "Can, Insect Repellent, AF Dwg. 4589008, 3-ounce capacity, three (3) each", and substitute "Can, Insect Repellent, AF Dwg. 4589008, 4-ounce capacity, Continental Can Company, or equal, three (3) each."

c. Item No. 9: File, Flat, Smooth, 6-Inch. Sample submitted by S. Buchsbaum & Company is acceptable.

d. Item No. 11: Goggle, Sun, Type I. Sample submitted by subject company is war surplus and not manufactured in accordance with Spec. MIL-G-4085, but is acceptable for D-1 Kit usage.

e. Item No. 13: Hat, Sun, Reversible. Samples submitted by subject company are acceptable.

Government's Exhibit No. 25
(Page Two)

TO	FROM	AIR	COMMENT NO.
MCPPXG-43	MCREXD-72	5 Feb 51	2 (con)

f. Item No. 32: Whistle, Police, Plastic. Sample submitted by the above-named company is acceptable.

g. Item No. 14: Compass, Type L-1. Delete "Order No." in Specification 2105-A, paragraph 3.13.6.

2. Appropriate amendments to applicable specifications are being made for future procurements.

Walter A. Carlson

WALTER A. CARLSON
Colonel, USAF (MC)
Chief, Aero Medical Laboratory
Engineering Division

WNM/bgs
2-0289
B. 196

Incls:
w/d

46
UNIT

6 FEB 10:02

CONCURRENCE:
Dennis D. Murray - MCEXD
Robert S. Hall, Jr. - MCEXD
Randall M. Briggs Capt MCEXD

(DO NOT WRITE BELOW THIS LINE)

GOVERNMENT'S EXHIBIT No. 26

ROUTING AND RECORD SHEET

AIR MATERIEL COMMAND

Subject: Goggles, Sun, Type I, Specification MIL-G-4085

To: MCREXD-8 From: MCREXD-72 Date: 16 Jan 51
Comment No. 1

Attn: Mr. Strand

1. Subject goggles are included in Spec. MIL-S-5775A (USAF) as a component of the Sustenance Kit, Type D-1.

2. The Contractor who is producing the Type D-1 Kit has submitted the inclosed goggles (3 pairs) for approval.

3. It is requested that your office determine whether or not these samples conform to subject specification, and advise your findings by Comment 2 hereon.

RANDALL W. BRIGGS
Captain, USAF (MC)
Chief, Medical Specialties Branch
Aero Medical Laboratory

Inc:
Goggles (3 pr)

NKH/bgs
2-9262
B. 196

CONCURRENCE

NORRIS N. MURRAY, MCR4XD-7
ROBERT S. HOLLIFIELD, MCREXD-7

GOVERNMENT'S EXHIBIT No. 27

ROUTING AND RECORD SHEET

AIR MATERIEL COMMAND

Subject: Goggles, Sun, Type I, Specification MIL-G-4085

To: MCREXD-72 From: MCREXD8 Date: 23 Jan 51
Comment No. 2

1. As requested in paragraph 3, Comment 1, the subject goggles were tested to determine conformity with Specification MIL-G-4085, Goggles, Sun, Type I.

2. Tests of the daylight transmission of the lenses were accomplished. The right lens was found to have 28 per cent daylight transmission, and the left lens was found to have daylight transmission of 26 per cent. Paragraph 3.4.4.1 of the specification stipulates 15 plus or minus 3 per cent for the daylight transmission of the subject lens.

3. The color of the lenses, designated in terms of chromaticity coordinates, is a neutral shade. The tested lenses are green. The chromaticity coordinates determined for the tested lenses do not fall within the limits stated in the specification, par 3.4.4.1.

4. It is recommended that subject goggles be rejected because of the above listed, marked deviations from Specification MIL-G-4085, Goggles, Sun, Type I.

J. M. HEIM
Chief, Physiology Branch
Aero Medical Laboratory

Incl:
n/c

FM/pal
2-8242
Bldg. 29

CONCURRENCE:
F. Moss

GOVERNMENT'S EXHIBIT No. 28-a

ROUTING AND RECORD SHEET
AIR MATERIEL COMMAND

Subject: Goggles, Sun, Type I, Specification MIL-G-4083
To: MCREXD-8 From: MCREXD-7 Date: 25 Jan 51
Comment No. 3

1. Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information.

2. It is pointed out that the item submitted, although not in accordance with the current specification, is for packaging in an aircraft type survival kit. This kit is stowed on multiplace aircraft and the contents are used only in an actual survival circumstance. Further, the percentage of survival kits ever put to arctic usage is very small.

3. Items in exact accordance with the sample goggle submitted by this office have been furnished as GFE on 15,000 D-1 kits which the Government has packaged. It is also considered that, inasmuch as these goggles are available, and to obtain the goggle per current specification would require their manufacture and an excess length of time, the production of E-1 kits can be expedited. The contractor has also advised that the cost of the goggle per subject specification is $3.30 each, while the cost of the substitute item is $.75 each. This would mean a saving to the Government of $38,250.00.

4. Your comments are requested.

RANDOLF W. BUGGS
Captain, USAF (MC)
Chief, Medical Specialties Branch
Aero Medical Laboratory

Inc:

RGH/fgs

Government's Exhibit No. 20

(Page One)

A copy of this form of contract, with such provisions and clauses, may be obtained from this office.

2. The award of the particular contract will normally be made to the low bidder, but the War Department reserves the right to negotiate with any bidder or other producer and to reject any and all quotations received.

3. Offers of discounts for prompt payment or each will be considered in determining which of the bids received is the lowest.

4. Three (3) copies of this form are to be completed, signed, and returned to this office on or before 9 October, 1940. In any event all the drawings and specifications are to be returned to this office by that date, unless instructions to the contrary are issued by the contracting officer. In completing this form, please follow carefully the enclosed instructions.

CLAUDE W. CHEARS
Contracting Officer

Enclosures:
Instructions, 1
4 Copies of War Department Standard Form

(Page Two)

CONTRACTOR'S PROPOSAL

1. Pursuant to the foregoing Request for Proposal, the undersigned hereby offers to furnish to the Government the items, in the quantities, at the prices, upon the delivery schedules, and in strict accordance with the specifications, all referred to in Title II.

2. The Government's notice of acceptance of this proposal must be given within 30 (10-13-30) A.C.) days after the return date specified in said Request for Proposal, by sending to the undersigned, by mail or otherwise, a notice of award, purchase order, or contract responsive to this proposal. (due to option on materials)

3. In the event the Government shall accept this pro-

Government's Exhibit No. 19
(Page Two)

posal, the undersigned will sign and deliver to the Government the form of contract referred to in said Request for Proposal (if that form requires manual execution by the undersigned), and embodying the terms and provisions of this proposal, subject to the following conditions:

4. Contractor certifies that the prices quoted herein are not in excess of any applicable O.P.A. price regulations.

5. Any acceptance of this proposal will be based on the following representations (including the data furnished by the undersigned on the specified portions of this form and on supplementary sheets attached hereto), which are specified to be true to the best knowledge and belief of the undersigned (elsewhere in this form called the "contractor").

Date: October 13, 1950

Name: Cappel, MacDonald & Co.
By Adam Cappel
Title: Vice President

TITLE I. (a) Contractor is

(X) Corporation, incorporated under laws of State of Ohio
( ) Partnership, consisting of
( ) Sole proprietorship of

(b) Business address: 129 So. Ludlow Street, Dayton 2, Ohio

(c) Telephone No. ADams 6244

(d) Name and location of contractor's plants where each item will be manufactured or from which furnished: 224 West Fifth Street

(e) Contractor now employs approximately 175 wage earners.

(f) The individual authorized to conduct negotiations on behalf of the contractor is: Adam Cappell
Title: Vice President

GOVERNMENT'S EXHIBIT No. 28-b

To: MCREXD7 From: MCREXD8 Date: 3 Feb 51
Comment No. 4

1. Comment No. 2 dated 23 January 1951 from this office states that tests made by the Vision Unit show the sample goggles submitted under Specification MIL-G-4085 (Type I) to be not acceptable.

2. The neutral lens described by the subject specification is considered by this office to be the best available for the purpose intended; however, in view of the exigencies of the present situation as outlined in Comment No. 3 dated 25 January 1951 and the fact that to the best of our knowledge no Unsatisfactory Reports have been received on goggles of the type submitted for approval, it is recommended that the substitute goggle be procured.

J. W. Heim
Chief, Physiology Branch
Aero Medical Laboratory

OTS/ebs
2-8242
Bldg 29

CONCURRENCE

O. T. Strand, MCREXD-8
R. H. Blount, Col., MCREXD-B

GOVERNMENT'S EXHIBIT No. 29

(Page One)

200 No. Bar Compass .05 ea

W. J. OPPER

Plaintiff's Exhibit

1350 STONE STREET • CHICAGO 10, ILLINOIS

10/10-52

Dear Mr. Oppel-

Pardon the hand note - but here is the mimeog and samples.

(1)	3/4" arc you want	.48 ea	
(2)	Mountain Ski-Goggle	1.40 ea	32,000
(3)	Signal Mirror	.25 ea	42,000 (available)
	Hand Compass (G.I. Gauge)	2.00	4,100
a-g	Flying helmet	.25	106,000
	Bomb sight-	?	46,000

I'll had the helmet & bomb sights in Indianapolis for some time - To work bomb sight out open bottom and put in motor - It will burn for about an hour then dark - Hand

W. J. OPPER

1550 STONE STREET • CHICAGO 10, ILLINOIS

as I understand to be thrown from a plane to form a channel or marking in water. Maybe you have a better idea.

In package a couple of compasses for the kiddies and the fair sex of the family and one for your Cadillac.

Do you want to gamble a bit with me and buy the signal mirrors by so advise. Can purchase for about .08¢ ea and freight about .01

All items in perfect condition and should show a substantial saving over market price to-day

Best of luck and hope you get the award.

W J Opper

P.S. A love like to Mr. Wayne's Secretary

GOVERNMENT'S EXHIBIT No. 30

(Page One)

War Department Standard Form

REQUEST FOR PROPOSAL AND CONTRACTOR'S PROPOSAL

(Long Form)

er!

Important Notice to Contractor. Only the following designated portions of this form are to be completed:

TITLE I

AF 16946

TITLE II, III and Cost Analysis

Date 29 September, 1950

No. RFP 51-49

Procurement Office: AF, Air Materiel Command
Wright Patterson Air Force Base, Dayton, Ohio
Buyer: J. Mitchell, Lt. USAF, MCPPX643
Phone: Kenmore 7111, Ext. 2-8135

P.R. 119432, 119450
Supply Division, MCMSXE52, MCMSXC41

Subject: (Item or items): SUSTENANCE KIT

(Item 1)

REQUEST FOR PROPOSAL

1. The Contractor is requested to submit a proposal for the furnishing of the items described or referred to in Title II (or such quantities as the contractor may be able to furnish), upon the delivery schedule specified in Title II, upon the understanding that the Government will furnish any materials described in Title II (D) 1, and in accordance with Contract Form 32, as amended to date of the proposal, including (a) all applicable provisions required by Federal law, Executive Orders, and War Department Procurement Regulations, and (b) the following additional clauses as indicated herein:

Government's Exhibit No. 30

(Page Three)

TITLE [redacted] (A) SCOPE OF PROPOSAL

~~RFP 52-10~~

F. O. B. POINT

TO BE FILLED IN BY CONTRACTOR

Item No. (1)	Description of Item (2)	Quantity (3)	Unit (4)	Delivery Required Date (5)	Delivery Required Quantity (6)	Price Unit (7)	Price Total (8)
	Class 13-C						
1.	Sustenance Kit - Individual Long Range Type E-1. Spec. MIL-S-6216 dated 24 August 1950 and requirements set forth below. S/N 8330-858840.	14,200	each	(SEE NOTE BELOW)		$206.12 203.40	$2,926,904.00 2,885,280.00

Additional requirements to Specification MIL-S-6216.

The color of the glove conforming to Specification AN-G-26 shall be Olive Drab, Shade 613 as given in ANA Bulletin 157.

Exhibit MCREXD5-45 dated 30 August 1950 shall be used in conjunction with AN Drawing AN229.

Delivery

Additional requirements to Specification MIL-S-6216.

The color of the glove conforming to Specification AN-G-26 shall be Olive Drab, Shade 613 as given in ANA Bulletin 157.

Exhibit MCREXD5-45 dated 30 August 1950 shall be used in conjunction with AN Drawing AN229.

Delivery

Delivery will be made at the rate requested by the Army Air Forces, ~~but in contacting many of our suppliers on components and raw materials,~~ and in turn their contacting of manufacturers of raw materials, we have been advised that because of commitments to various branches of the Armed Services they cannot make delivery unless the need for this item justifies precedence.

We, therefore, request the cooperation of Wright Field to assist us in expediting when necessary. We will spare no effort to complete on ~~schedule.~~

10/18/50

WAR DEPARTMENT STANDARD FORM

Budget Bureau No. 40-R...

LIST OF SUBCONTRACTS AND SUPPLY ORDERS

File/Order No.

Contractor Coppel MacDonald & Co.

Contract No.

NAME AND ADDRESS OF SUBCONTRACTOR OR SUPPLIER (1)	SUBCONTRACTOR'S ORDER No. (2)	DESCRIPTION OF ITEM (3)	QUANTITY (4)	UNIT PRICE PAID BY CONTRACTOR (5)	UNIT PRICE CHARGED BY PRIME CONTRACTOR (6)	TOTAL PAID OR TO BE PAID (7)
[illegible] Mfg. Co., East Highgate, Va.		Axe, hand, Hudson Bay type	14,200	1.75000		$ 24,850.00
[illegible] Baltzman Balfer Corp.		Bag, Sleeping, mountain	14,200	39.98000		567,516.00
[illegible] Safety Razor Co., Boston, Mass.		Razor Blade, double-edge	24,000	.03136		706.24
[illegible] Boettner, Co., Xenia, Ohio		Boot, Mukluk	14,200	4.60000		69,560.00
[illegible] Wax Works, Ozone Park, N. Y.		Candle, wax, plumbers type	14,200	.04500		639.00
[illegible] & Tremayne, Inc., St. Tavis		Chamois skin	14,200	.11160		1,584.72
[illegible] J. Cooper, Chicago, Illinois		Compass, magnetic, pocket	14,200	.46300		6,816.00
[illegible] Magneto Corporation		Compass, lensmatic	14,400	5.00000		72,000.00
[illegible] Chatham & Co., Chicago, Illinois		Canteen assembly, water	14,200	1.25000		17,750.00
[illegible] Miller & Co. Long Island City, New Jersey		Container, mail out	14,200	18.75000		266,250.00
[illegible] File Co., Providence, R. I.		File, flat, smooth, six inch	14,200	.[illegible]		3,506.83
[illegible] Corp. New York, New York		Fuel, ration heating	23,400	.0875		2,917.00
[illegible] Glove, Champaign, Illinois		Gloves, air crew kitten style, wool	14,200	1.50		21,300.00
" " "		Gloves, " " " leather	14,200	1.80		25,980.00
Bloomdrath Glove Co., Chicago, Illinois		Glove, flying inner	14,200	1.25		17,750.00
[illegible] Grant Co., Leominster, Mass		Goggle, ski-mountain	14,400	5.00		71,000.00
Iglestrom Oberlin, Massilon, Ohio		Headnet, mosquito	14,200	2.415		34,293.00
Davies Young Soap Co., Dayton, Ohio		Insect repellant	14,200	.24		3,408.00
Camillus Cutlery Co., Camillus, New York		Jackknife, utility	14,200	.60192		8,547.26
Baker & Co. New York, New York		Knife, Hunting and sheath	14,200	1.78		25,276.00
Chapstick Co. Lynchburg Va.		Lipstick, antichap	14,200	.0833		1,182.86
[illegible]ber Co., Ashland, Ohio		General, survival	14,200	.10975		1,558.00
[illegible] Co.		Matches, ordinary kitchen	28,400	.25		7,100,00
[illegible] Specialty Co., Toledo, Ohio		Mirror, signal	14,200	4.60		65,320.00
[illegible] Inc., Ann Arbor, Minn.		Monocular	14,200	16.72		237,424.00
[illegible] Mfg Co., Two Rivers, Wisconsin		Net, gill	14,200	2.13[illegible]		30,615.20
[illegible] Co. Annapolis, Md.		Plotter, aircraft	14,200	1.20		17,040.00
[illegible] Frocks, Cincinnati, Ohio		Raincoat	14,200	17.50		248,500.00
[illegible] Co., Cleveland, Ohio		Razor safety	14,200	.6[illegible]36		[illegible]97.12
[illegible] Safety Appliance Co., Pittsburg, Pa.		Salt tablets (3 tubes)	14,200	.0511[illegible]		726.74
[illegible] E. Atkins Co., Indianapolis, Ind.		Saw-knife	14,200	1.52667		21,678.71
[illegible] & Perkins, Detroit, Michigan		Skillet-container assembly	14,200	3.9[illegible]		56,771.60
[illegible] Trap Co. of America, Letits, Pa.		Snare, sleeve locking	28,400	.24[illegible]3		[illegible]81.37
[illegible]on Soap Co., Burlinton, Ia.		Soap tissures	28,400	.20		[illegible].00
[illegible]gton Stocking Co., New Brunswick, N. J.		Socks, wool, cushion sole	28,400	.7517		[illegible].28

Budget Bureau No. 40 R27

WAR DEPARTMENT STANDARD FORM

LIST OF SUBCONTRACTS AND SUPPLY ORDERS

File/Order No.

PRIME CONTRACTOR Coppal MacDonald & Co.

Contract No.

NAME AND ADDRESS OF SUBCONTRACTOR OR SUPPLIER (1)	SUBCONTRACTOR'S ORDER No. (2)	DESCRIPTION OF ITEM (3)	QUANTITY (4)	UNIT PRICE PAID SUB CONTRACTOR (5)	UNIT PRICE CHARGED BY PRIME CONTRACTOR (6)	TOTAL PAID SUBCONTRACTOR (7)
[redacted] Knitting Works, Hippon, Wisconsin		Socks, wool, ski	14,200	.83		$ 11,786.00
[redacted] Moulding Co., Dayton, Ohio		Spoon, nylon	14,200	.115		1,633.00
[redacted] Planing Co., Troy, New York		Stove sharpening	14,200	.2205		3,131.10
[redacted] Fastened, Washington, Ohio		Tent poles	14,200	6.20		88,040.00
[redacted] - Oberlin Co., Massillon, Ohio		Tent assembly	14,200	41.46		588,732.00
[redacted] Co., Bristal, Conn.		Watch, wrist	42,600	2.48		105,648.00
[redacted] Container Corp., Middletown, Ohio		Interior carton	14,200	.4057		5,760.94
[redacted] Paper Co., Dayton, Ohio		Tape	14,200	.09		1,278.00
[redacted] Container Corp., Middletown, Ohio		Interior carton - domestic	1,775	.7723		1,370.83
[redacted] Paper Co., Dayton, Ohio		Tape	1,775	.02676		47.50
[redacted] Co.		Interior case - export	1,775	5.64		10,011.00
[redacted] Paper Co., Dayton, Ohio		" " " bag liner with cement	1,775	2.32237		4,122.21
[redacted] Metal Mfg. Co., Dayton, Ohio		Steel banding & clips	1,775	.1841S		326.92
[redacted] sources		Miscellaneous supplies	3,550	.05		177.50
[redacted] Corp, Chicago, Illinois		Poly-Ethlyne bags	14,200	.27		3,834.00
[redacted] per, Chicago, Illinois		Toggle, ski-mountain	14,200	1.40		19,880.00
[redacted] Crump Co., Inc., Richmond, Va.		Axes, hand, Hudson Bay type	14,200	2.38152		33,817.55

P05B

Government's Exhibit No. 30
(Page Twenty-one)

90

Government's Exhibit No. 47

(Page Two)

goggles I arranged to have it determined that while these goggles did not meet the original specifications they would generally serve the purpose and could be used in the kits under procurement at the time. Approximately five months ago I received a payment of $1,000.00 cash from Mr. Oppen, pursuant to our agreement, and about the middle of July 1951 I received an additional payment of $200.00 cash from Mr. Oppen. I haven't received any additional payments from Mr. Oppen since that date. During my last contact with Oppen, which was approximately 15 July 1951 at the time I received the above $200.00 payment Oppen advised me that I was to receive approximately $1750.00. However, as stated above, I have not received the additional $550.00. I would like to make this point clear. I would have submitted goggles presented by any contractor for analysis, regardless of whether or not any consideration had been promised me, particularly when it required a deviation from the original specifications. I would like to further state that the goggles submitted by Oppen, while not in accordance with the original specifications, did meet the requirements of purposes for which they were intended. Furthermore, I would like to state that in my mind, in the above transaction, that I did not in any manner make an effort to accept inferior equipment which the Government was procuring.

(Page Three)

I would like to state that the above should not be construed to mean that any allowance of deviations was only to obtain gratuities, money or gifts, but in the performance of my duties or reasonable requests, and I would have acted upon as such for *any* contractor or prospective contractor.

I have read this statement consisting of three pages and it has been read to me. I have initialed all preceding pages and corrections.

ROBERT GEORGE HOLLAFIELD, Sr.

Government's Exhibit No. 37

(Page Three)

Sworn to and subscribed before me this 26th day of September, 1951.

MONCURE NOBLE
Special Agent

Witness:
LAURENCE COLLINS
Special Agent

GOVERNMENT'S EXHIBIT No. 38

Dayton, Ohio,
September 26, 1951

I, Robert George Hollifield, Sr., make the following sworn statement voluntarily to Jack W. Landis and Clay W. Pardo who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to me. I have been advised of my right to counsel and that what I say may be used against me.

I am 37 years of age and reside with my wife and two children at 2053 Arlene Avenue, Dayton 6, Ohio.

I am employed as a designer, Land Survival Unit, Medical Specialty Branch, Aero Medical Laboratory, Wright Patterson Air Force Base, Dayton, Ohio. My duties as a designer included developing survival kits for the Air Force and I was the project engineer on a kit known as "E-1". I helped to standardize the "E-1" kit. I helped to write the specifications for this kit. I might say here that I made some mistakes in these specifications, in that some of the material requirements turned out to be critical and hard to get. Some deviations were made in this regard and at the request of contractors

Government's Exhibit No. 38

Around the early part of 1951, William J. Opper came to my office about some ski goggles he was interested in selling to the government. Opper said some of the goggles he had met the procurement requirements and others did not but he could not tell them apart from visual inspection. In the supply room near my office, Opper said to me something like, "If you can use them I can make it interesting for you." He said he would give me so much for each goggle the government purchased but I do not recall this amount. I do recall that the total he agreed to give me was about $1750.00.

Opper brought in a sample goggle and wanted to know if it was satisfactory. I had it tested and in my opinion it was satisfactory. I wrote to procurement and told them the sample goggle was acceptable.

As a result of this agreement with Opper, I have received a total of $1200.00 from him. I received $1000.00 in cash around March or April 1951 or about five months ago. I went to Chicago and got this money from Opper in his office. Around July 1951, Opper was in Dayton, Ohio and gave me $200.00. There is nothing definite about when I was to get the balance of $550.00 but it had been my intentions to get it.

I have read this page and four previous pages and to the best of my knowledge the foregoing is true and correct.

ROBERT GEORGE HOLLIFIELD, SR.

Subscribed and sworn to before me this 26th day of September, 1951.

CLAY W. PARDO, *Special Agent, FBI.*

Witness:

JACK WARREN LANDIS
Special Agent, FBI.

September 26, 1951

GOVERNMENT'S EXHIBIT No. 31

CAPPEL - MacDONALD AND COMPANY
CAPPEL BUILDING, DAYTON 1, OHIO
PACKING DIVISION

10 November 1950

Headquarters
Air Materiel Command
Wright-Patterson Air Force Base
Dayton, Ohio

Re: War Surplus Materials
Contract AF 33 (038)-16916

Attn: Mr. Robert Hollifield
Survival Unit
Aero Med Lab

Gentlemen:

It is our intention to furnish surplus material, covered in Specification MIL-S-6216, Item No. 8, Compass, Magnetic, Pocket as originally manufactured by the Waltham Watch Company. A new compass can be furnished at the same price.

We plan to furnish at surplus, in addition to the above, the following:

Item No. 20, Goggle, Ski-Mountain, Type I—Specification JAN-O-1134.

Item No. 21, Headnet, Mosquito, M-1944, Specification PQD458.

It is our belief that the above surplus is equal or better than material that can be procured at present, and it will expedite delivery to a considerable extent.

Samples of each of the above, herewith, have been submitted.

Very truly yours,

CAPPEL, MacDONALD & Co.
ADAM CAPPEL
Vice President

AC/jm
Central Files

GOVERNMENT'S EXHIBIT No. 41

(Page One)

October 16, 1951

Federal Bureau of Investigation
105 West Adams Street
Chicago, Illinois

Attention: Mr. Regan

Gentlemen:

I have been asked to submit a statement relating to my so called dealings with Robert Holafield.

In the winter of 1950, as best I can recall, I was at Dayton, Ohio then visiting with the firm of Cappel & MacDonald & Company with whom I had numerous business transactions. At the office of this firm I met Mr. Holafield and in a discussion about things made for the armed forces, Mr. Holafield then stated that the next time I was in Dayton to visit him at Wright Field. Sometime later I went to Wright Field and saw Mr. Holafield and had a social visit with him. We discussed no particular matters of any kind. Sometime later when I visited Mr. Holafield at Wright Field I discussed with him the possibility of making a wrist compass that was being required by the armed forces as well as using my ¾ inch compass in any future kit. While there I saw photographs of numerous items being used and some of the items seen by me I recognized as items that I furnished to prime contractors.

Sometime in the spring of 1951 I learned about an objection to a goggle and decided while in Dayton, Ohio visiting Cappel & MacDonald & Company to discuss the matter with Mr. Holafield. At that time Mr. Holafield stated that he did not know what objection was being made and that if I care to know specifically what that objection was to talk with someone in the optical department. Mr. Holafield and myself then went to the optical department and I tried to learn what specific objection was being made and was informed that there was some slight difference in the lense specification.

GOVERNMENT'S EXHIBIT No. 32

CAUTION—REMOVE PROTECTOR SHEET BEFORE TYPING

Exhibit

AEDC FORM NO. 68
(ERK 31 MAY 49)
(Formerly AAGS Form No. 70-NA)

DAYTON AIR MATERIEL FIELD OFFICE
Office of the AF Representative
DAYTON, OHIO

CONTRACT CHANGE NOTIFICATION NO. R (33)

To: Capehart MacDonald & Company
Box 3 4th Ludlow Street
Dayton, Ohio

Pursuant to the Article of the contract entitling to changes, the above named Contractor is hereby authorized and directed to accomplish the change listed below in response to the written order and consent of the same but terminates and may terminate by cancellation subject to the terms and conditions of both as the process date hereof. Whenever both a purchase order number and a contract number are given above, both numbers are to be used in any shipping papers, packing sheet, invoices, correspondence, or related document, the purchase order number preceding the contract number.

Description of Change:

a. Item No. 4 of AAF-3-6216, Goggle Ski-Mountain, Type 1, Specification AN-G-1134. It is satisfactory for the contractor to furnish surplus goggles.

b. Item No. 21 of AAF-3-6216, Headnet, Mosquito, 1-1944, Specification PD458. It is satisfactory for the contractor to furnish surplus mosquito headnet.

c. Item No. 8 of AAF-3-6216, Compass, Magnetic, Pocket, Specification AAF-6635. It is satisfactory for the contractor to furnish surplus compass originally manufactured by the Waltham Watch Company.

d. Item No. 34 of AAF-3-6216, Raincoat, Specification AAF-A-6638.

(1) It is satisfactory for the contractor to use Type 1 tape for strapping purposes in lieu of Type II.

(2) It is satisfactory for the contractor to furnish the raincoat with bottom hem and bottom of the sleeve turned and cemented.

e. Item No. 14, Container, First Aid Kit, Specification C-A-561, Type 1 No. finish, condition "A", should read Specification AN-A-561, Condition "A".

f. (1) Item No. 4, Bag, Sleeping, Mountain, of Specification AAF-3-6216, Specification AAF-B-830, the Bag, Carrying, Waterproof, is not required as a component of the Type R-1 Kit.

(2) Specification AAF-3-6216, which indicates Item 4 as "Bag, Sleeping, Mountain, Large - except that bag shall be filled with same weight 110 percent down instead of Down-Feathers mixtures", shall be construed to mean "Down shall contain not less than 90 percent by weight of pure down", as indicated in Specification 1-82 dated 3 October 1952, National Stockpile, Material Purchase Specifications, Waterfowl Feathers and Down. The down shall be "Type B, Domestic and European" (Class 1) and refers to materials of North or South American or European origin.

g. (1) Item No. 47 of AAF-3-6216, Tent Assembly, one man, all area, Survival, Drawing No. 5W3948. On Drawing 5W3948 Detail A, leather for Tent Pole Holder should be 1/16" leather.

(2) A 1/4 inch bar tack in lieu of a 1/2 inch zig zag stitch is satisfactory in Section A-A only of Drawing No. 5W3948.

(3) Delete the lining requirements of the tent.

(4) The main tent floor seam shall be coated on the under side with cement, Specification AAF-C-5539 (Detail A of Drawing 5W3948).

Page 1 of 3 Pages

Distribution

Authority for Issuance

AAF dated 26 December 50

AF Representative

GOVERNMENT'S EXHIBIT No. 43

(Page Three)

MONTH OF

Mr. William J. Oppo
1330 Stone St. Apt-205
Chicago 10 Illinois.

IN ACCOUNT WITH **NATIONAL BOULEVARD BANK OF CHICAGO**

PLEASE ADDRESS TO OUR AUDITING DEPARTMENT ALL INQUIRIES REGARDING ENTRIES IN YOUR ACCOUNT.

CHECKS AND OTHER DEBITS LISTED IN ORDER OF PAYMENT READ ACROSS			DEPOSITS AND OTHER CREDITS	DATE	NO. ITEMS PAID	BALANCE
BALANCE BROUGHT FORWARD ☞						
				FEB 28 51		16,226.07 *
20.00 -	500.00 -			MAR 1 51	2	15,706.07 *
31.23 -	329.35 -			MAR 2 51	4	15,345.49 *
46.22 -						
50.00 -				MAR 5 51	6	15,249.27 *
110.25 -	500.00 -	150.00 -				
85.00 -						
100.00 -				MAR 6 51	11	14,304.02 *
160.80 -	3.05 -		20,000.00	MAR 7 51	13	34,140.97 *
240.71 -	136.34 -			MAR 8 51	15	33,763.92 *
100.80 -			528.08	MAR 12 51	16	34,192.00 *
				MAR 13 51	17	33,931.35 *
260.65 -				MAR 14 51	18	33,909.54 *
21.81 -				MAR 14 51	19	33,809.54 *
100.00 -						
106.00 -	327.18 -	290.94 -				
3.36 -				MAR 15 51	23	33,081.86 *
				MAR 16 51	24	33,071.04 *
10.82 -						
500.00 -	51.43 -	96.00 -		MAR 19 51	27	32,423.61 *
				MAR 20 51	28	32,420.61 *
3.00 -				MAR 21 51	30	31,882.36 *
3[illegible] -	500.00 -					
1338.[illegible] -	4.29 -	274.87 -		MAR 28 51	33	31,269.43 *
[illegible] -						
[illegible] -			1,091.22	MAR 28 51	35	31,660.65 *
[illegible] -			.70	MAR 29 51		31,661.35 *
19.38 -	1,506.30 -	400.00 -		MAR 30 51	38	30,841.88 *
200.00 -				MAR 27 51	42	29,123.52 *
142.28 -				MAR 27 51	43	28,983.24 *
1,000.00 -	500.00 -			MAR 29 51	45	27,483.24 *
5.00 -	373.73 -	2,970.00 -		MAR 30	48	24,134.51 *

PLEASE EXAMINE AT ONCE. IF NO ERROR IS REPORTED IN 10 DAYS, THE ACCOUNT WILL BE CONSIDERED CORRECT.

THE LAST AMOUNT APPEARING IN THIS COLUMN IS YOUR BALANCE

PURCHASE ORDER

CAPPEL, MacDONALD AND COMPANY

DAYTON 1, OHIO

Plaintiff's Exhibit

TO

W. J. Opper
230 E. Ohio Street
Chicago, Illinois

ORDER No. F 5506 -0

DATE 11-7-50

Please ship the following order:

QUANTITY	DESCRIPTION	OUR NO.	UNIT PRICE	EXTENSION
14,200	Goggle, Ski-Mountain, Type I per Spec. JAN-G-113b		1.40 ea.	19880.00
	SUBJECT TO SOURCE APPROVAL, AND OUR RECEIVING THE FORMAL CONTRACT FOR 14,200 TYPE E-1 KITS, OR MERCHANDISE MAY BE RETURNED FOR FULL CREDIT.			

Ship to: c/o Otterbein Press, 252-254 W. 5th St., Dayton, Ohio
(delivery - Perry St. side)

Terms

This order is not to be filled at a price higher than above or last quoted. ALL INVOICES are to be rendered in DUPLICATE. Above Order No. MUST appear on Invoices and Shipping Labels.

CAPPEL, MacDONALD & COMPANY

GOVERNMENT'S EXHIBIT No. 33

GOVERNMENT'S EXHIBIT No. 34

PURCHASE ORDER

CAPPEL, MacDONALD AND COMPANY

DAYTON 1, OHIO

Plaintiff's Exhibit

TO

W. J. Opper
1250 Stone St.
Chicago 10, Illinois

ORDER No. G 1059

DATE 12-6- 50

Please ship the following order:

QUANTITY	DESCRIPTION	UNIT PRICE	EXTENSION
14,200	(71 cases) Goggle, Ski-Mountain Type 1, per Spec. JAN-G-1134	$1.40	$19,880.00

Acceptance of this order contingent upon the conditions set forth in Exhibit A.

FOR CONTRACT AF33(038)-16916 -- DO-09 CERTIFIED UNDER NPA REGULATION NO. 2

3 SAMPLES TO BE SENT TO US FOR:
FIRST ARTICLE APPROVAL FOR WRIGHT FIELD
EXPERIMENTAL PACKAGING BY US
APPROVAL AND RETURN TO YOU AS A PROTOTYPE

INCREASED OPTION CLAUSE OF 50% TO BE EXERCISED NOT LATER THAN MARCH 13, 1951.

DELIVERY AT THE RATE OF ////////// PER WEEK STARTING DELIVERY: IMMEDIATE

ABOVE PRICE IS FIRM ON DELIVERY OF THIS ORDER

14,200 (71 cases) Goggle, Ski-Mountain Type 1, per Spec. JAN-G-1134 $1.40 $19,880.00

Acceptance of this order contingent upon the conditions set forth in Exhibit A.

FOR CONTRACT AF33(038)-16916 -- DO-09 CERTIFIED UNDER NPA REGULATION NO. 2

3 SAMPLES TO BE SENT TO US FOR:
FIRST ARTICLE APPROVAL FOR WRIGHT FIELD
EXPERIMENTAL PACKAGING BY US
APPROVAL AND RETURN TO YOU AS A PROTOTYPE

INCREASED OPTION CLAUSE OF 50% TO BE EXERCISED NOT LATER THAN MARCH 13, 1951.

DELIVERY AT THE RATE OF ////////// PER WEEK STARTING DELIVERY: IMMEDIATE

ABOVE PRICE IS FIRM ON DELIVERY OF THIS ORDER

Ship Via Consolidated Freightways from Seattle, Washington Terms Net

ALL INVOICES MUST BE RENDERED IN DUPLICATE AND BILL OF LADING MUST ACCOMPANY INVOICE TO ASSURE PROMPT PAYMENT OTHERWISE DISCOUNT DATE WILL BE DETERMINED FROM RECEIPT OF MERCHANDISE. ABOVE ORDER NO. MUST APPEAR ON ALL INVOICES AND SHIPMENTS. SIGNED ACKNOWLEDGMENT IS REQUESTED AT ONCE.

CAPPEL, MacDONALD & CO.

By _____

GOVERNMENT'S EXHIBIT No. 35

PURCHASE ORDER

CAPPEL, MacDONALD AND COMPANY

DAYTON 1, OHIO

TO William Opper
1250 Stone St.
Chicago, Illinois

ORDER No. G 1688

DATE August 31, 1951

Please ship the following order:

QUANTITY	DESCRIPTION	UNIT PRICE	EXTENSION
10,310	Goggles, ski	$1.75 each	$18,042.50
	CONTRACT AF 33(038)-26634 - DO-21 CERTIFIED UNDER MPA REGULATIONS Acceptance of this order contingent upon conditions set forth in Exhibit attached. Commercial packing acceptable to common carrier, uniform quantities to shipping container. Packing list to accompany each inmmt shipment. DELIVERY: As soon as possible SHIP TO: Cappel MacDonald & Co. 252 W. Fifth St. (Perry St. Side) Dayton, Ohio		

10,310	Goggles, ski	$1.75 each	$18,042.50
	CONTRACT AF 33(038)-26634 - DO-21 CERTIFIED UNDER MPA REGULATIONS Acceptance of this order contingent upon conditions set forth in Exhibit attached. Commercial packing acceptable to common carrier, uniform quantities to shipping container. Packing list to accompany each inmmt shipment. DELIVERY: As soon as possible SHIP TO: Cappel MacDonald & Co. 252 W. Fifth St. (Perry St. Side) Dayton, Ohio		

Ship Via fob - Factory Terms Net

ALL INVOICES MUST BE RENDERED IN DUPLICATE AND BILL OF LADING MUST ACCOMPANY INVOICE TO ASSURE PROMPT PAYMENT OTHERWISE DISCOUNT DATE WILL BE DETERMINED FROM RECEIPT OF MERCHANDISE. ABOVE ORDER NO. MUST APPEAR ON ALL INVOICES AND SHIPMENTS. SIGNED ACKNOWLEDGMENT IS REQUESTED AT ONCE.

CAPPEL, MacDONALD & CO.

By _____

Government's Exhibit No. 43
(Page Four)

MONTH OF

Mr. William J. Opper
1250 Stone St. Apt-206
Chicago 10 Illinois.

IN ACCOUNT WITH **NATIONAL BOULEVARD BANK OF CHICAGO**
PLEASE ADDRESS TO OUR AUDITING DEPARTMENT ALL INQUIRIES REGARDING ENTRIES IN YOUR ACCOUNT.

CHECKS AND OTHER DEBITS LISTED IN ORDER OF PAYMENT READ ACROSS			DEPOSITS AND OTHER CREDITS	DATE	NO. ITEMS PAID	BALANCE
BALANCE BROUGHT FORWARD						
			24,134.51	MAR 30		24,134.51 *
				APR 2	2	23,650.95 *
348.37 –	135.19 –			APR 3	3	21,150.95 *
2,500.00 –						
178.49 –	2.70 –	525.00 –		APR 5	6	20,444.76 *
2,500.00 –	1,500.00 –	120.00 –		APR 9	9	16,324.76 *
50.00 –	50.00 –					
			.10			
			3,220.76	APR 9	11	19,445.62 *
2,160.78 –	181.28 –			APR 10	13	17,103.56 *
500.00 –				APR 11	14	16,603.56 *
40.00 –						
				APR 13	15	16,563.56 *
			4,081.90	APR 13		20,645.46 *
20,600.00DM –	1,000.00 –		20,442.07	APR 16	17	19,487.53 *
100.00 –				APR 17	18	19,387.53 *
[redacted] –				APR 17	19	19,336.43 *
14.44DM –				APR 17	20	19,321.99 *
86.50 –						
319.48 –	333.50 –			APR 18	21	19,235.49 *
				APR 19	23	18,582.51 *
5,222.78 –	24.10 –	118.76 –				
1,044.80 –						
				APR 20	27	12,172.87 *
200.00 –	1,581.42 –	158.76 –		APR 23	30	10,232.69 *
			[redacted]	APR 24	29	10,283.79 *
762.35 –						
129.00 –				APR 25	30	9,521.44 *
				APR 26	31	9,392.44 *
100.00 –	195.00 –	793.40 –				
83.70 –	310.45 –			APR 27	36	7,909.89 *
			14,584.34	APR 30		22,494.23 *

PLEASE EXAMINE AT ONCE. IF NO ERROR IS REPORTED IN 10 DAYS, THE ACCOUNT WILL BE CONSIDERED CORRECT.

THE LAST AMOUNT APPEARING IN THIS COLUMN IS YOUR BALANCE

Government's Exhibit No. 43
(Page Six)

MONTH OF

Mr. William J. Opper
1250 Stone St. Apt-206
Chicago 10 Illinois.

IN ACCOUNT WITH **NATIONAL BOULEVARD BANK OF CHICAGO**
PLEASE ADDRESS TO OUR AUDITING DEPARTMENT ALL INQUIRIES REGARDING ENTRIES IN YOUR ACCOUNT.

CHECKS AND OTHER DEBITS LISTED IN ORDER OF PAYMENT READ ACROSS			DEPOSITS AND OTHER CREDITS	DATE	NO. ITEMS PAID	BALANCE
BALANCE BROUGHT FORWARD				MAY 31 51		23,963.54
25.00-				JUN 1 51	1	23,938.54 *
110.14-	90.00-	96.00-				
142.25-				JUN 4 51	5	23,500.15 *
200.00-			661.50			
			11,984.02	JUN 4 51	6	35,945.67 *
1,033.90-				JUN 5 51	7	34,911.77 *
3.85MS				JUN 6 51	8	34,907.92 *
130.36 –	5.77DM –			JUN 7 51	10	34,771.79 *
[redacted]			1,144.54	JUN 11 51	11	35,891.33 *
			[redacted]	JUN 11		35,916.33 *
602.10 –	200.00 –		3,575.00	JUN 15 51	13	38,689.23 *
5.35 –	25.00 –	500.00 –				
7.70DM –				JUN 18 51	17	38,151.18 *
30.38-				JUN 19 51	[redacted]	38,120.80 *
820.92-	136.39-	94.81-				
25.00-				JUN 20 51	21	37,043.68 *
314.32-	14.73-	48.59-				
17.57-	97.88-			JUN 21 51	26	36,530.39 *
136.80-	161.85-	202.80-				
85.68-	20.00-	229.16-				
110.00-				JUN 22 51	33	35,604.30 *
2.53-	1,000.00-	525.00-		JUN 25 51	36	34,076.77 *
			5,000.00	JUN 25 51		39,076.77 *
17.65-	7.00-	104.13-		JUN 26 51	39	38,947.99 *
50.00-				JUN 27 51	40	38,897.99 *
28.00-	1.79-	1,000.00-				
1,400.00-				JUN 29 51	44	36,468.20 *

PLEASE EXAMINE AT ONCE. IF NO ERROR IS REPORTED IN 10 DAYS, THIS ACCOUNT WILL BE CONSIDERED CORRECT.

THE LAST AMOUNT APPEARING IN THIS COLUMN IS YOUR BALANCE

GOVERNMENT'S EXHIBIT No. 36

Received 2 July 1951 M.N.

FIFTH AMENDMENT

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE OF WAR No. 24—(31)

Compulsory Self-Incrimination Prohibited. . . . No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue or when such answer might tend to degrade him.

The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial.

GOVERNMENT'S EXHIBIT No. 37

(Page One)

SWORN STATEMENT

I, ROBERT GEORGE HOLLIFIELD, SR., residing at 2953 Arlene Ave., Dayton, Ohio, prior to making the statement contained in the following paragraphs, have had explained to me my rights under the Fifth Amendment to the Constitution of the United States by Special Agents MONCURE NOBLE and LAURENCE COLLINS, who have identified themselves to me as Agents of the Office of Special Investigations, USAF. I understand that I do not have to make any statement, that any statement I do make may be used against me in a court of law, and that I have the right to have an attorney. With such understanding, I voluntarily and of my own free will, make the following statement.

I am presently employed as Chief, Land Survival Unit, Medical Specialty Branch, Aero Medical Laboratory, Wright Air Development Center, Wright Patterson AFB, Dayton, Ohio. In my present position I supervise other engineers in the unit and assist the project engineers in their work. I am authorized to make decisions and directing policy of my unit. I am also authorized to prepare kit specifications and approve deviations thereof.

(Page Two)

I have been asked whether or not I am acquainted with a WILLIAM J. OTTEN, Chicago, Illinois. I wish to state that I have known Mr. OTTEN for about a year. Mr. OTTEN is a dealer in surplus property, particularly ski goggles of the type used in Air Force survival kits. Approximately nine months ago Mr. OTTEN called at my office in the Aero Medical Laboratory and offered to pay me the sum of $175.00 provided I would submit his surplus goggles to the Vision Unit, Physiology Branch, Aero Medical Laboratory and arrange to have them approved and accepted by the Air Force as an acceptable component of survival kits. I agreed to do this and in accordance with this agreement samples of these goggles were submitted to the above branch and after testing said

Government's Exhibit No. 41

(Page One)

I wish to be understood that at no time had I requested Mr. Holafield to do anything on my behalf. I was making no sale to the government as my sales were at all times confined to prime-contractors, who I understand obtain approvals.

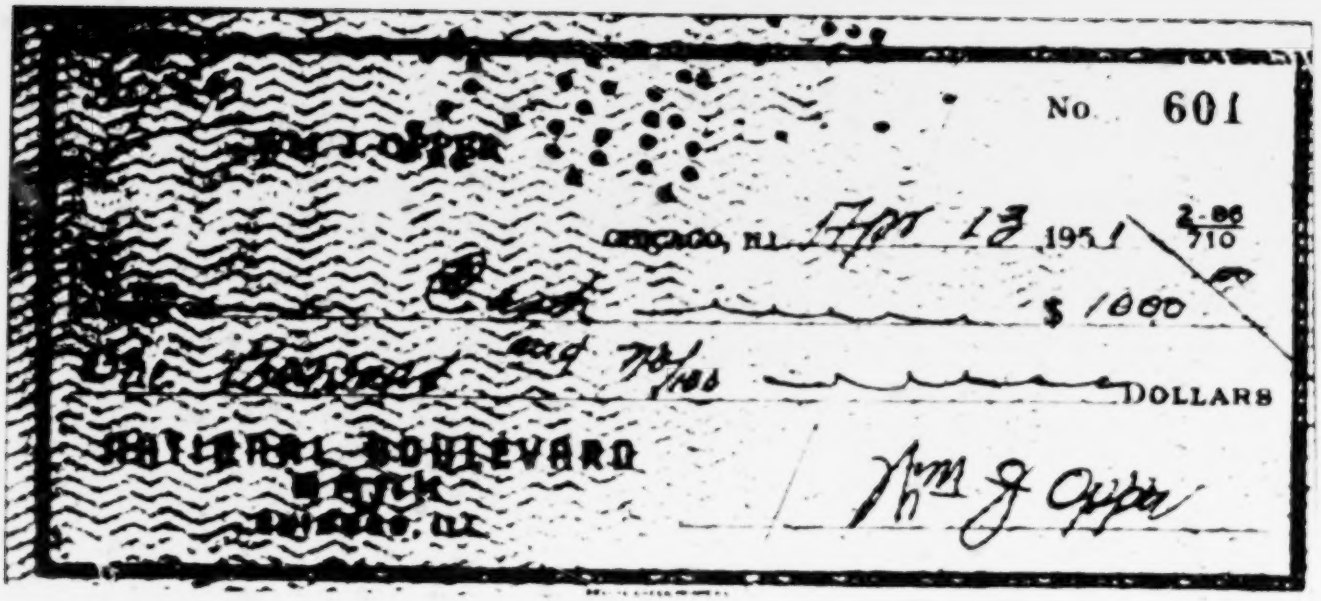
(Page Two)

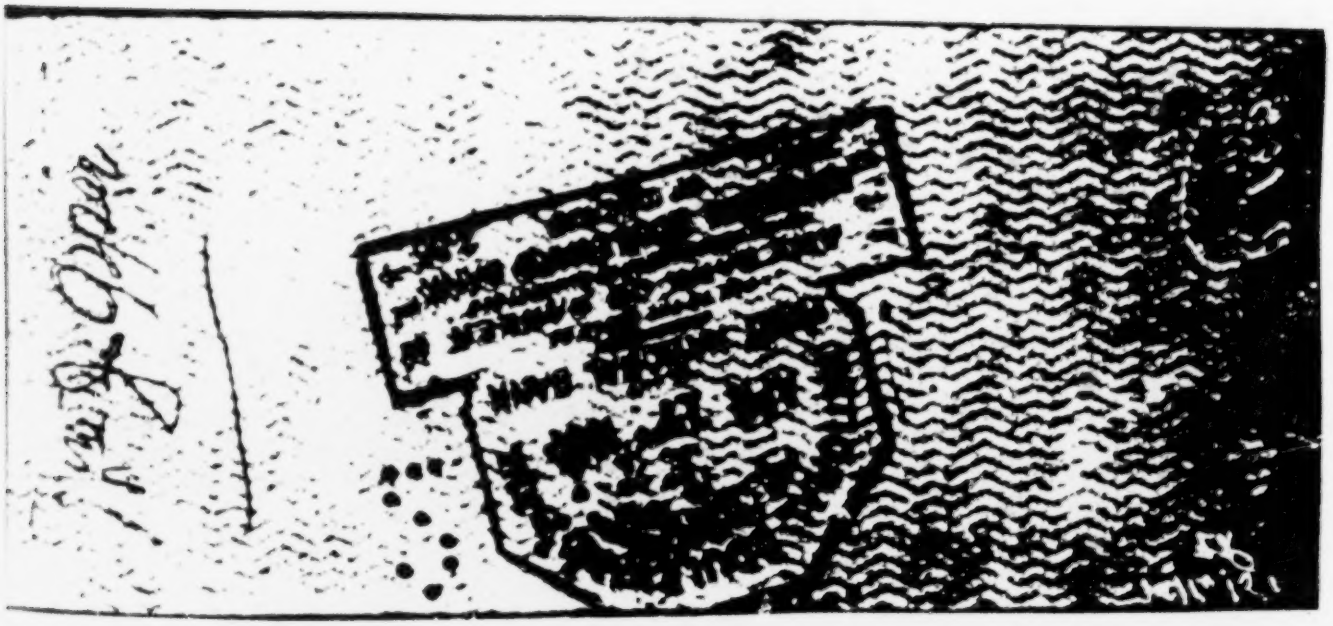
Sometime in the early part of 1951 Mr. Holafield had been in Chicago and our respective families visited socially. Sometime in April, as best I can recall, Mr. Holafield communicated with me and indicated that he was hard pressed financially and although I felt no moral or legal obligation to Mr. Holafield in any manner I indicated to him that if I could help him I would try to do so. When he visited Chicago he called upon me and stated that the reason for his financial distress was that he had to meet a mortgage on his home of approximately $1,200.00. Being mindful of the fact that I could help him financially and being charitable I gave Mr. Holafield $1,000.00 which he promised to repay when he was financially able to do so and a few weeks later gave him $200.00. I realize now the foolishness of my act but had no motive in so doing except in making him a loan.

Very truly yours,

WM. J. OPPER

GOVERNMENT'S EXHIBIT No. 42





GOVERNMENT'S EXHIBIT No. 45

[redacted] SUBORDER MC51-24

1. Participating Comp.	2.	3.	4. Project No.
MCREXM Attn: Mr. Koch			8-690-11
5. Project Title: Goggles and Sunglasses		6. AMC Form No. 67 ☐ Hist ☒ Hist not begun initiated	7. Date: 17 January 1951
8. Highest Security Classification of Project: ☐ Top Secret ☐ Secret ☐ Restricted ☐ ABC Restricted Data ☐ Confidential ☒ Unclassified		9. M.P. Tech. Objective: 50-12	10. M.P. Import. Rating: B
		12. Date Completion Req'd	11. Priority: 3-A
		13. T. I. or Directive Ref.	
14. Major End Item		15. Major Component	

16. AA.19225 — DESCRIPTION OF WORK

To cover necessary time and material to measure daylight transmission by use of a spectrophotometer on the attached lens of Type I Goggle.

18 MARCH 1951

MA-2

Continued on reverse side ☐

FOR USE OF RESPONSIBLE COMPONENT

To cover necessary time and material to measure daylight transmission by use of a spectrophotometer on the attached lens of Type I Goggle.

18 MARCH 1951

MA-2

Continued on reverse side ☐

FOR USE OF RESPONSIBLE COMPONENT		
17. Project Engineer: F. Moss; FREDERICK MOSS; Symbol MCREXD8 Phone 2-8242	18. Branch Chief: J. W. HEIM, Ch. Physiol. Br.; Symbol MCREXD8 Phone 2-3231	19. Approved—Lab. or Sect. Chief: R. L. KING, Ch. Service Br. FOR: W. A. CARLSON, Col, USAF (MC); Date 17 Jan 51

FOR USE OF PARTICIPATING COMPONENT			
20. Est. Comp. Date	21. Project Engineer; Symbol; Phone	22. Work will be accomplished under Basic Field No.	23. Approved—Lab. or Sect. Chief

CLOSING ACTION			
24. Return to: MCREXD8	26. Reason: ☒ Completed ☐ Cancelled	27. Approved—Par. Comp. Chief: M. E. SORTE, Lt. Colonel, USAF, Chief, Materials Lab.	28. Approved—Resp. Comp. Chief: W. A. CARLSON, Colonel, USAF (MC), Chief, Aero Medical Lab.
25. Date Completed: 3-15-51			

MCRH Form No. 73 (28 Apr 50)
Air Force-WPAFB-L-26 OCT 50 2551

Supersedes MCRH Forms No. 73A, 73B, and 203, which will be destroyed.

GOVERNMENT'S EXHIBIT No. 46

APR 13-51

B

(TC) DAYTON, O.

RA 1849

Plaintiff Exhibit 46

SPEC. INST.

T & C

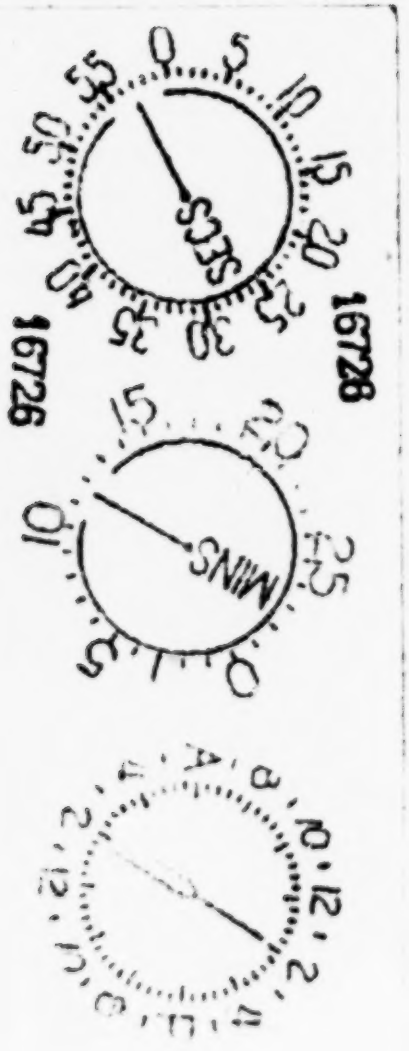
Copy

MI 20717

um Copy

L 6

85



DATE JUL 31-51 A A OUT **B**

FROM

PLACE RR 1849 STATE (TC) DAYTON, O.

TEL. NO ~~MI 2-0917~~

PERSON

SPEC. INST.

Plaintiff's Exhibit

T & C

TO

PLACE ● Cgo STATE

COLLECT TEL. NO MI 2-0717

PERSON Wm Tipper

ACCEPTED

ADDRESS NAME

FILING TIME 10-05 P.	OPERATOR 120 7
TOLL CENTER	MINS 12 CLASS PN
TERM VIA	CHARGE 220
FIRST ROUTE	MESSENGER TAX
ALT ROUTE	

GOVERNMENT'S EXHIBIT No. 47

GOVERNMENT'S EXHIBIT No. 44

ROUTING AND RECORD SHEET
AIR MATERIEL COMMAND

Subject: War Surplus Materials, Contract No. AF33(038)-16946

To: MCPPX6-43 From: MCREXD-7 Date: 22 Nov 50
Comment No. 1

Attn: Lt. J. Mitchell

1. Reference attached letter from the Cappel-MacDonald Company, Dayton, Ohio requesting the approval of the following items:

Compass, Magnetic Pocket
Goggle, Ski-Mountain, Type 1
Headnet, Mosquito, 17-1944

2. This Laboratory has carefully examined the items submitted by the contractor and the samples appear suitable for inclusion in the Type E-1 kit. Although the compass is not in exact accordance with the current specification, little difference can be noted. The goggles are in exact accordance with the current specification. The mosquito headnet is in accordance with the current specification except the stiffener ring is a fibrous material instead of metal. This is suitable.

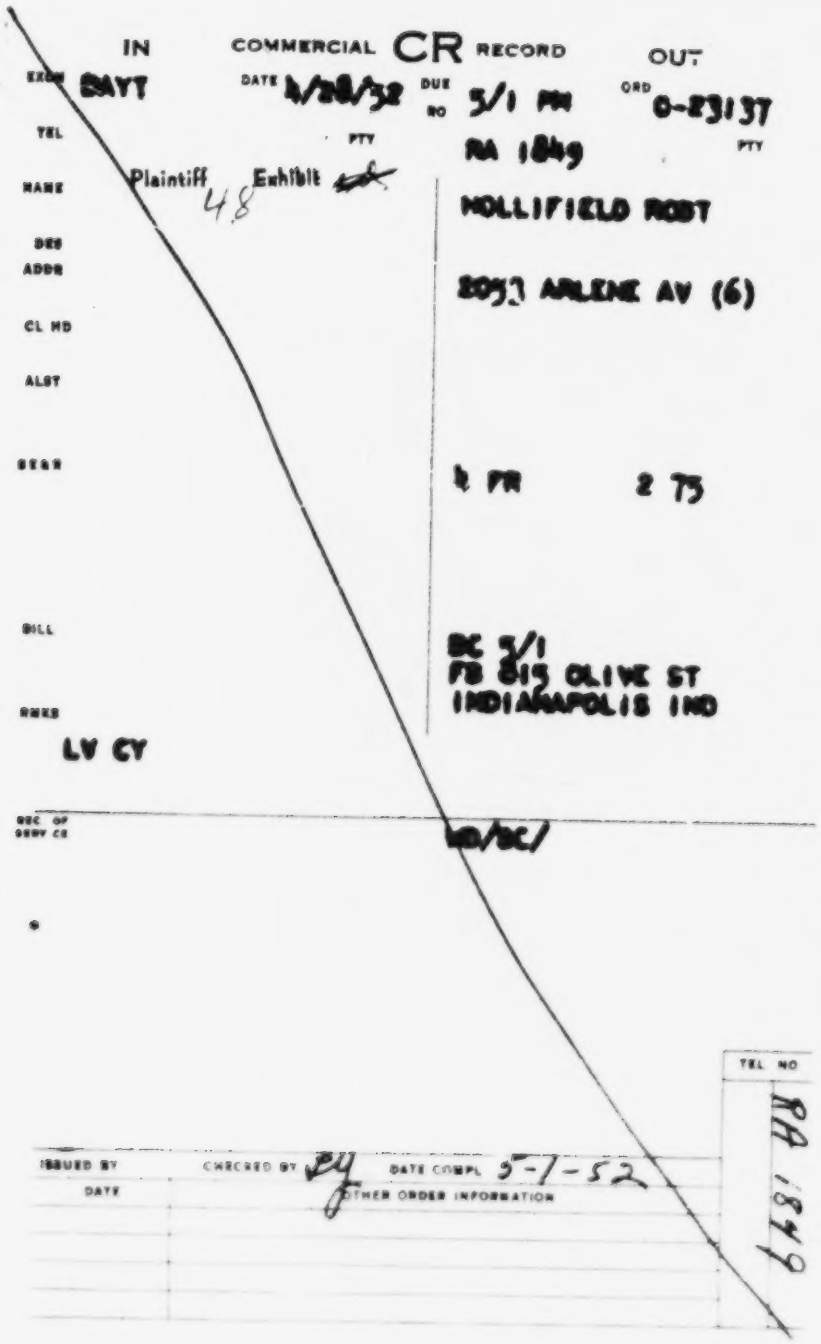
WALTER A. CARLSON
Colonel, USAF (MC)
Chief, Aero Medical Laboratory
Engineering Division

1 Incl:
Ltr fr Cappel MacDonald
dtd 10 Nov 50

RGH/gz
2-2119
Bldg. 190

CONCURRENCE:

R. S. HAUGHTON, MCREXD-7
RAYMOND W. BUSSE, Capt.,
MCREXD-7
R. H. BROWN, Col., MCREXD-7


IN
COMMERCIAL CR RECORD
OUT
EXCH DAYT
DATE 4/28/32
DUE 5/1 PM
ORD 0-23137
TEL RA 1849
PTY
Plaintiff Exhibit 48
NAME HOLLIFIELD ROBT
DES
ADDR 2053 ARLENE AV (6)
CL HD
ALST
SE&R
4 FR 2 75
BILL
RMKS LV CY
BC 5/1
FB 815 OLIVE ST
INDIANAPOLIS IND
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MD/BC/
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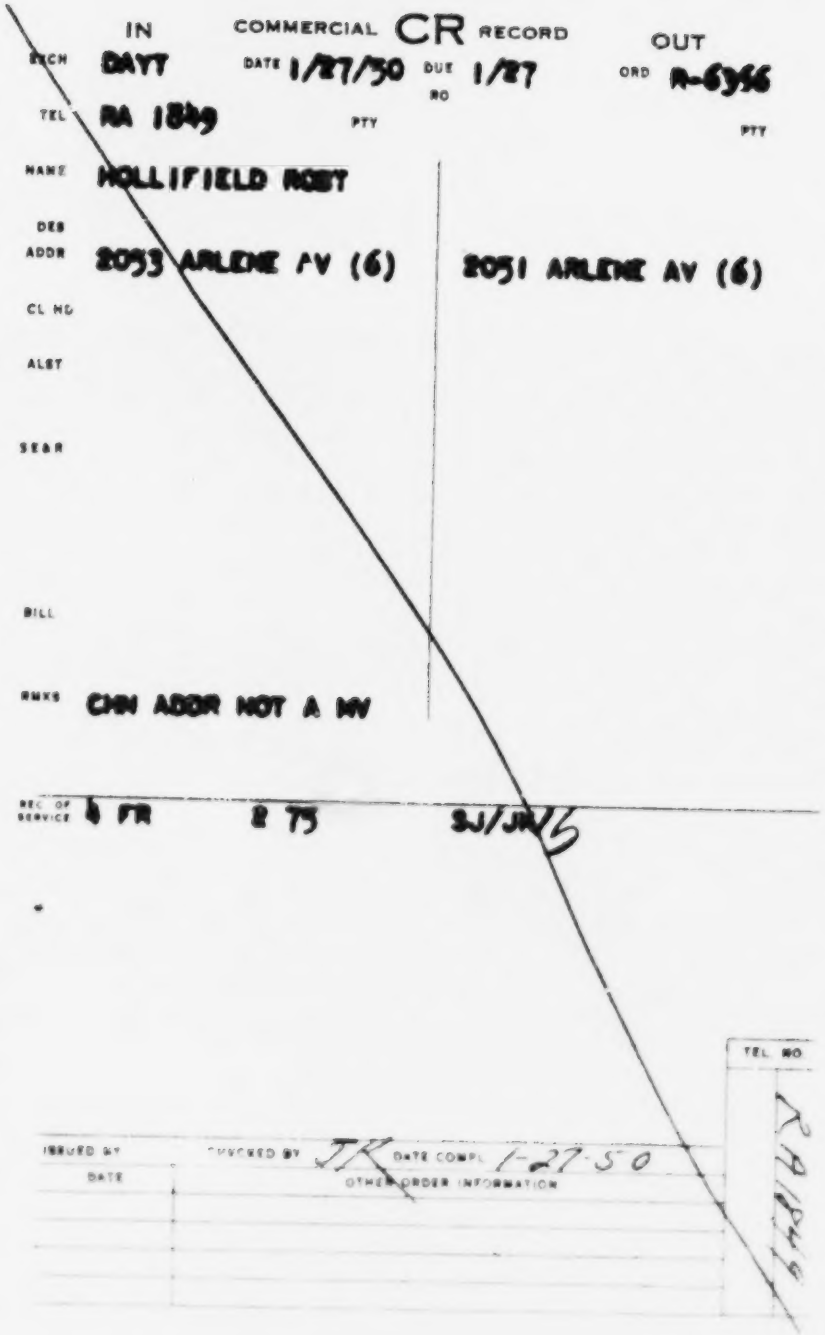
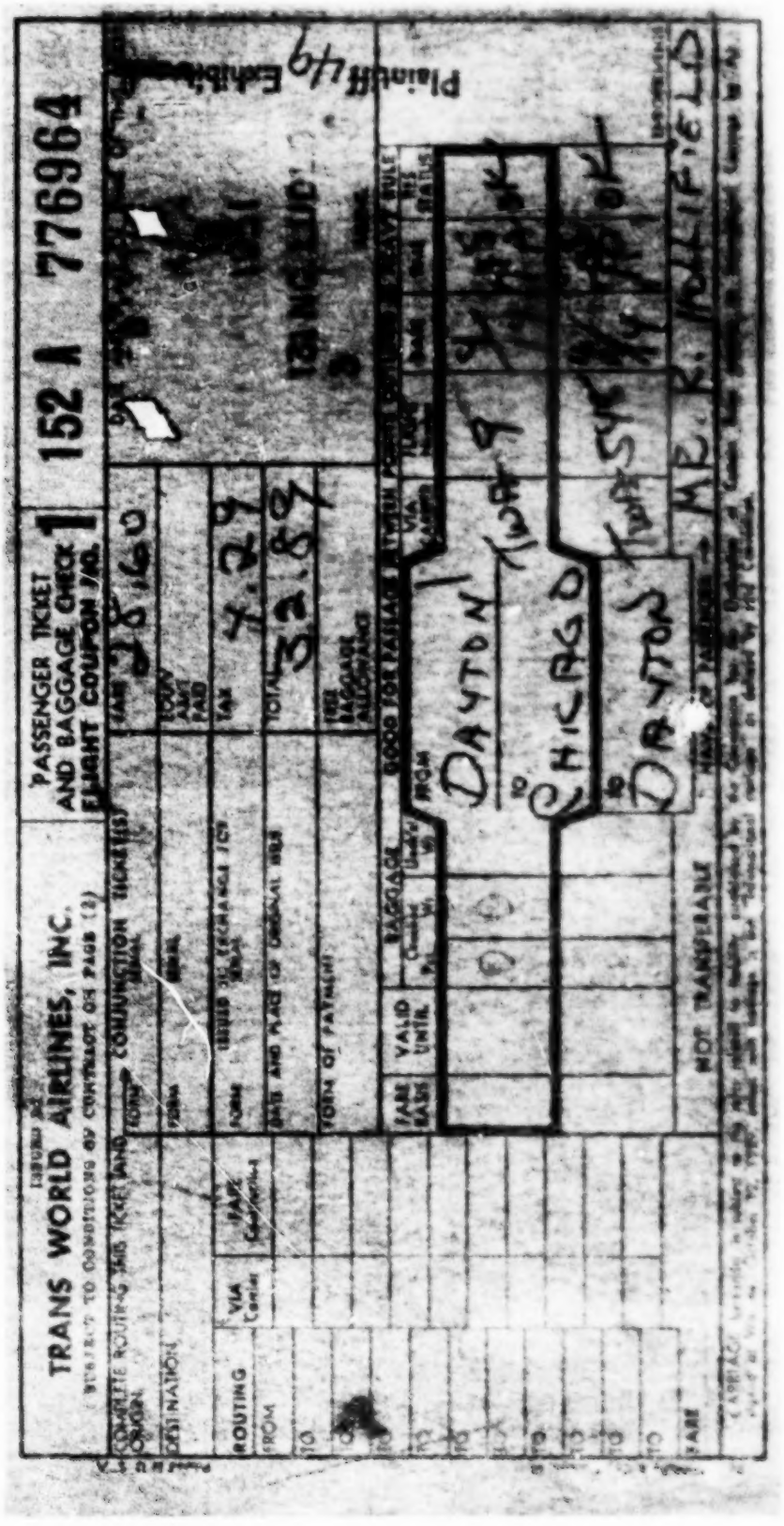
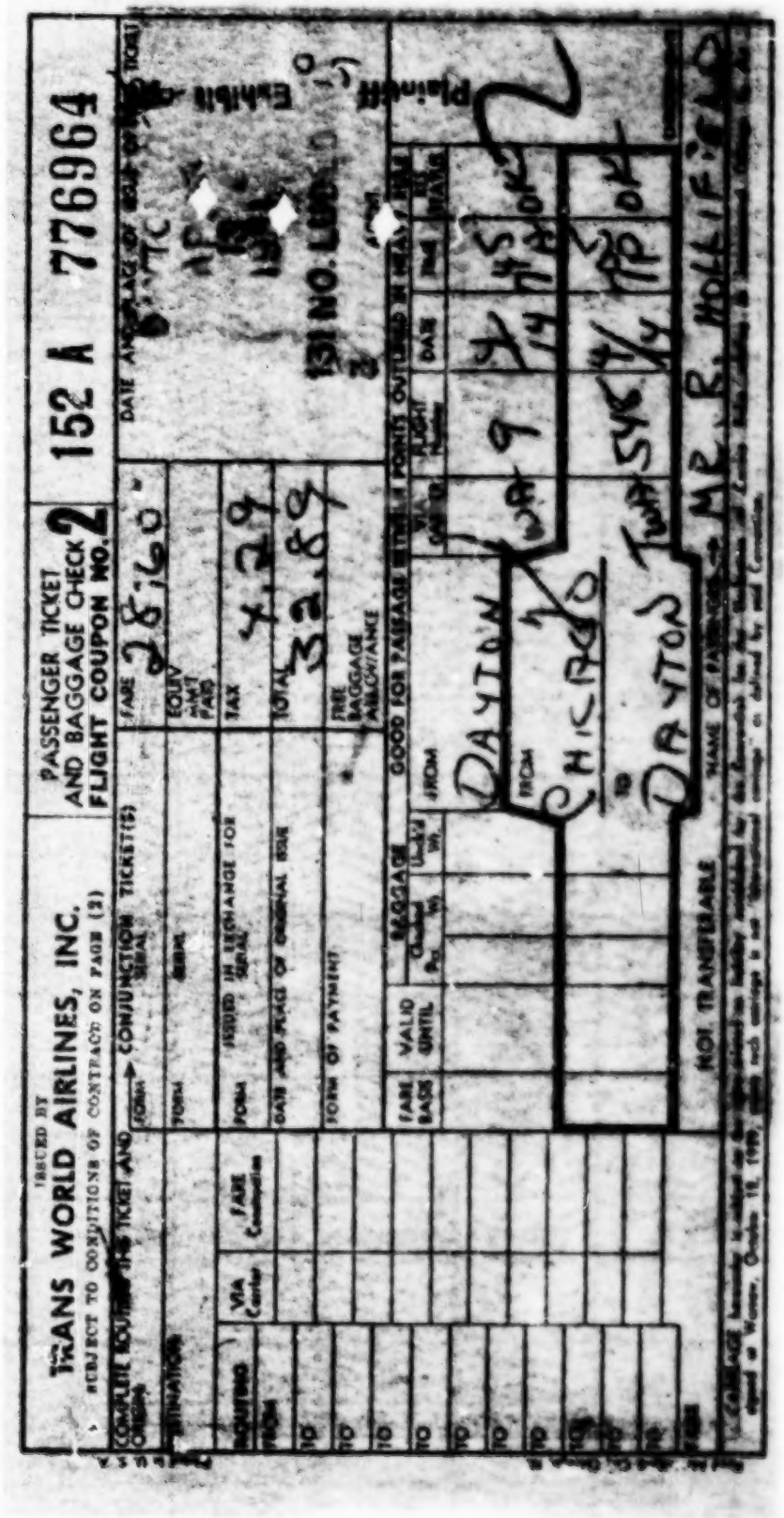
ISSUED BY
DATE
CHECKED BY
DATE COMPL 5-1-52
OTHER ORDER INFORMATION


IN
COMMERCIAL CR RECORD
OUT
EXCH DAYT
DATE 1/27/50
DUE 1/27
ORD R-6956
TEL RA 1849
PTY
NAME HOLLIFIELD ROBT
DES
ADDR 2053 ARLENE AV (6)
2051 ARLENE AV (6)
CL HD
ALST
SE&R
BILL
RMKS CHN ADDR NOT A NV
REC OF SERVICE
4 FR 2 75
SJ/JR/5
TEL NO
RA 1849
ISSUED BY
DATE
CHECKED BY
DATE COMPL 1-27-50
OTHER ORDER INFORMATION

GOVERNMENT'S EXHIBIT No. 49



GOVERNMENT'S EXHIBIT No. 50



Hollifield Robert C

LAST NAME	FIRST NAME AND INITIAL	IDENTIFICATION No.	TYPE OF APPOINTMENT	EOD DATE	AGENCY	CALENDAR YEAR

Standard Form No. 1137
General Regulations No. 102

LEAVE RECORD

GPO 16—45000-1

Form prescribed by Comp. Gen., U. S.
June 28, 1940

MONTH	PAY PER. No.	ANNUAL TAKEN HRS	ANNUAL TAKEN TOTAL	ANNUAL HRS. ACCR.	SICK TAKEN HRS.	SICK TAKEN TOTAL	SICK HRS. ACCR.
JANUARY	✓ 6			4			
	✓ 20	5	5	12	8	8	10
FEBRUARY	✓ 3	4	9	20			
	✓ 17	4	13	28	16	24	20
MARCH	✓ 3			36			
	✓ 17	4	17	44			30
	✓ 31			52	8	32	
APRIL	✓ 14	1	[illegible]	60			
	✓ 28	20	46	68			40
MAY	✓ 12	12	58	76			
	✓ 26	3	61	84			50
JUNE	✓ 9	16	77	92	8	40	
	23	15	[illegible]	100			60

MONTH	PAY PER. No. (INC)	ANNUAL TAKEN HRS	ANNUAL TAKEN TOTAL	ANNUAL HRS. ACCR.	SICK TAKEN HRS	SICK TAKEN TOTAL	SICK HRS. ACCR.
JULY	7	48	129	107			
	✓ 21	4	133	113			70
AUGUST	✓ 4			119	8	48	
	✓ 18	90	213	[illegible]			80
SEPTEMBER	✓ 1	4	217	131	8	56	
	15	12	229	[illegible]	8	64	90
	29	19	248	[illegible]			
OCTOBER	13			160			
	27			172			100
NOVEMBER	10			180			
	24			188			110
DECEMBER	8			196			
	22			204			120
	31			208			

ABSENCE WITHOUT PAY
W AWL—SUSPENDED

DATE	TYPE	HRS.	TOTAL
9/28	W	8	8

COMPENSATORY TIME RECORD

PAY PERIOD	HOURS WORKED	HOURS TAKEN	BAL.

Plaintiff Exhibit 51

GRANTED

YEARLY SUMMARY (HOURS)

ITEM	ANNL	SICK
BAL. FORWARDED	[illegible]	197
YR. ACCRUAL	192	89
TOTAL	626	246
TOTAL TAKEN	248	64
BALANCE	378	182 ✓

LAST NAME	FIRST NAME AND INITIAL	IDENTIFICATION No.	TYPE OF APPOINTMENT PERMANENT (FOR LEAVE PURPOSES)	EOD DATE	SERVICING AGENCY	CALENDAR YEAR
H6145	HOLLIFIELD	ROBERT C		407	USAF-HQ. ANC	1981

Defendants' Exhibit A-1

(Page Eighty-three)

ITEM	DESCRIPTION	PRICE
21	Mosquito Head Net (Buchsbaum make)	2.90
22	Insect Repellent	.25
23	Jack Knife	.65
24	Hunting Knife with Sheath	1.55
25	Anti Chap Lipstick	.085
26	Magazine for Rifle	G.F.E.
27	Survival Manual	.135
28	Matches & Cloth	.145
29	Emergency Mirror	4.71
30	Minocular with case	16.72
31	Net	2.89
32	Carbine	G.F.E
33	Plotter—Aircraft	1.20
34	Raincoat (Buchsbaum make)	16.00
35	Safety Razor	.64
36	Rifle	G.F.E.
37	Salt Tablets (3)	.065
38	Saw Knife Assembly	6.75
39	Sheath (Price included in item 24)	
40	Skillet (includes die cost)	4.60
41	Snare (2)	.46
42	Soap Tissue (2)	.40
43	Socks Wool (2)	1.61
44	Socks Ski Wool	1.05
45	Nylon Spoon	.30
46	Sharpening Stone	.225
47 60	Tent (Buchsbaum make)	44.75
48	Wrist Watches (3)	7.80
		$201.62

DEFENDANTS' EXHIBIT A-2
(Page Eighty)

S. BUCHSBAUM & CO.
1737 S. Michigan Ave.
Chicago 16

AF-16916

ALTERNATE BID

Using War Surplus Ski Mountain Goggle. Tentative approval by Engineering, subject to further approval of Procurement Office. Goggle price $1.40 each. (Instead of $5.00 each)

Price Complete Kit—$267.40

Total Contract Value—$3,797,080.06

10-12-50

DEFENDANTS' EXHIBIT D

MCPFVH1-C4:MCS:jr
5 December 1950

MCPFVH1-C4

Dayton Area Office
Dayton AF Procurement Field Office

Subject: Sub-contracts Approved Under
Prime Contract No. AF 33(038)-16916

To: Cappel, MacDonald & Company
127 S. Ludlow Street
Dayton 1, Ohio

1. Your request for approval of certain of your sub-contractors, as required under the price revision article of the subject contract, has been reviewed by the undersigned Contracting Officer.

2. In considering such aproval, this Contracting Officer has taken into consideration the facts surrounding each individual sub-contract. Approval of the orders in the existing circumstances is not to be considered as a precedent for approval of future orders, as subsequent approval will be considered in the light of the then existing circumstances. It is expected that your procurement procedures will be set up and maintained so that it is readily shown that all purchases are made to the best interest of the government. It is expected that to the greatest extent practicable, procurements will be placed with the lowest responsible bidder, and if not so placed, the valid reasons for placing the order elsewhere will be maintained on a "bid-comparison sheet". In general, it is expected that quotations will be secured from at least three qualified competitive bidders, and if this is impossible or impracticable, the reason therefor will be clearly stated.

3. Attention is also invited to the necessity of some sub-contractors securing from the United States Air Force, or other Government Agency, certification of the competency of the sub-contractor's personnel, ability, process, equipment, and/or material.

DEFENDANTS' EXHIBIT D-1

Subject: Sub-contracts Approved Under
Prime Contract No. AF 33(038)-16916

Among those requiring such a certification are plating, welding, and heat-treating plants. Applications for certification may be made by the subcontractor to the United States Air Force Field Office having administration of the geographical area in which the subcontractor's plant is located. The approval herein given does not constitute such certification of the competency for which a certificate is otherwise required. When so required, such a certificate must be secured in addition to the approval herein given.

4. The following sub-contracts are approved as to source and amount:

W. J. Opper, 1250 Stone St., Chicago 10, Illinois G-1059
W. J. Opper, 1250 Stone St., Chicago 10, Illinois G-1060
W. J. Opper, 1250 Stone St., Chicago 10, Illinois G-1058

5. This approval shall not relieve you of the responsibility of justifying the prices thereon to be to the best interests of the government, in connection with any price redetermination or renegotiation proceedings.

6. Information verbally furnished by your company is to the effect that the items on the afore mentioned subcontracts are surplus items. It is requested that your quality control personnel carefully examine each unit to determine that it is in a like new condition and that storage has in no way affected its usability.

HARRY A. CHANCE
1st Lt., USAF
Contracting Officer

cc: Chicago AF P F O

DEFENDANTS' EXHIBIT V

(Page One)

AIR MATERIEL COMMAND
ENGINEERING DIVISION
WRIGHT-PATTERSON AIR FORCE BASE
DAYTON, OHIO

MCREXM6/JVH/mms

MATERIALS LABORATORY
TEST REPORT ON

Goggle, Ski-Mountain

Report No.: MCREXM6-Mc51-27
E. O. No: S-690-11
Contractor: —
Submitted by: MCREXD84
Date: 15 March 1951
Spec. No.: JAN-G-1134
Contract No.:
P. O. No.:

A. PURPOSE:

1. To determine conformance of one set of lenses to the requirements of the referenced specification for Type II Goggles.

B. FACTUAL DATA:

2. The set of lenses, Type II, were submitted 24 January 1951 without identification and were assigned Physics Branch Serial Number 19264-1 and 19264-2.

3. The optical tests conducted together with specification requirements and results obtained on the lenses are tabulated in Table I.

C. CONCLUSIONS:

4. The set of lenses submitted conforms to the requirements of Specification JAN-G-1134 for Type II Goggles, with respect to the optical properties tested.

Defendants' Exhibit V

(Page One)

D. Recommendations:

None, data merely submitted.

Prepared by: V. J. Handmach

Approved by: M. E. Sorte
Lt. Colonel, USA
Chief, Materials
ratory
Engineering Div

Distribution: MCREXD84

Concurrence:

W. R. Koch,
MCREXM6

(Page Two)

MCREXM6-Mc51-27
E. O. No. S-690-11
15 March 1951

Table I—Optical Data

Property	Spec. Req.	P.B. 19264-1	1
Total Visible Light Transmission, percent	8 - 18	14.3	1
Transmission at 365 millimicrons, per cent	0.5 Max.	0.1	
Transmission from 700 to 4000 millimicrons, percent	9 Max.	5	
Thickness, millimeters	3.5 ± 0.5	3.4-3.6	
Drop Test, Breakage, percent	10 Max.	O.K.	

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SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 24 1954
HAROLD B. WILLEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. [redacted] 49

WILLIAM J. OPPER,

Petitioner.

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN M. KELLEY, JR.
803 First National Bank Building
Miami, Florida
Counsel for the Petitioner

REDERICK BERNAYS WIENER
uite 815, Stoneleigh Court
025 Connecticut Avenue, N.W.
Vashington 6, D. C.

DEFENDANTS' EXHIBIT A-1

(Page Eighty-three)

10-12-50
AF16916

ESTIMATE PROCUREMENT MATERIALS FOR SUSTENANCE KIT — Type E-1

All prices quoted as of October 12, 1950

ITEM	DESCRIPTION	PRICE
1	Axe	$ 2.71
	(Axe purchased in Canada, subject to 45% duty Sheath subject to 12½% duty Axe Actual cost.....$1.42 Sheath ..... .58 Both articles complete with duty $2.71)	
2	Sleeping Bag	36.50
3	Gillette Razor Blades (20)	.57
4	Mukluk Boot	4.90
5	Plumbers Candle	.07
6	Cartridges	G.F.E.
7	Chamois Skin	.10
8	Magnetic Compass	.48
9	Lensatic Compass	5.00
0	Plastic Water Container	1.00
1	Bail-Out Container ("Buchsbaum make")	15.90
2	File	.25
3	Fishing Kit	6.50
4	First-Aid Kit	1.515
5	Food Packets	G.F.E.
6	Fuel Ration Heating (2)	.14
7 & 18	Glove N3 and Glove N2	3.85
9	Flying Gloves	1.25
0	Ski Mountain Goggle Type 1	
	Pure Estimate	5.00

DEFENDANTS' EXHIBIT G

ROUTING AND RECORD SHEET
AIR MATERIEL COMMAND

Subject: Goggles, Ski, for Survival Kit

To: MCREXD-7 From: MCREXD-8 Date: 6 Feb 51
Comment No. 1

Attn: Mr. R. G. Hollifield

Subject item has been tested and satisfactorily meets the optical requirements as stipulated in Specification No. JAN-G-1134.

J. W. Heim
Chief, Physiology Branch
Aero Medical Laboratory

FM/pal
2-8242
Bldg 29

CONCURRENCE

F. Moss, MCREXD-8
O. T. Strand, MCREXD-8
J. W. Heim, MCREXD-8

DEFENDANTS' EXHIBIT U

Defendant U Exhibit

UNCLASSIFIED

Physics Lab

SUBORDER

MC 51-27

1. Participating Comp.	2.	3.	4. Project No.
MCREXM Attn: Mr. Handmacker			S-690-11
5. Project Title		**6. AMC Form No. 67** ☐ Has ☒ Has not been initiated	**7. Date**
Goggles and Sun glasses			24 January 1951
8. Highest Security Classification of Project ☐ Top Secret ☐ Secret ☐ Restricted ☐ ABC Restricted Data ☐ Confidential ☒ Unclassified		**9. M.P. Tech. Objective** PO-12	**10. M.P. Import. Rating** B
		11. Priority 3-A	
		12. Date Completion Req'd	**13. T. I. or Directive Ref.**
14. Major End Item		**15. Major Component**	

16. PR. 19264 **DESCRIPTION OF WORK**

To cover necessary time and material for comparison of the optical characteristics of the submitted lenses with Specification No. JAN-G-1134 by spectrophotometry or other stipulated methods.

MARCH 1951

INDEX

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Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes and rule involved	3
Statement	3
Reasons for granting the writ	13
Conclusion	22
Appendix A—Statutes and rule involved	23
Appendix B—Summary of evidence bearing on the *corpus delicti*	25

AUTHORITIES

CASES: Page

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No._____

WILLIAM J. OPPER,

Petitioner.

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, William J. Opper, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit (R. II, 765) affirming the conviction of petitioner as to Counts 1, 4 and 5 of the indictment.

OPINION BELOW

The opinion of the Court of Appeals (R. II, 766) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1954 (R. II, 765). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTONS PRESENTED

1. Whether there was a lawful verdict where, during the poll of the jury, a juror repeatedly answered that he "guessed" it was his verdict, and the trial judge, without directing that the jury retire to deliberate further, repeatedly insisted that the juror answer "yes" or "no" until the juror finally made an affirmative answer.

2. Whether, where a juror's answer during the poll indicates only a qualified concurrence in the verdict, his affidavit is admissible to explain the meaning of his qualified answer.

3. Whether, where an admission is made to law enforcement officers after the date of the acts charged as crimes, it is to be so far treated as a confession that, in the absence of corroboration, it is inadmissible.

4. Whether a conviction can be sustained where there is, apart from an admission made to law enforcement officers after the date of the acts charged as crimes, no proof of the *corpus delicti*.

5. Whether, in convicting petitioner the jury, and in sustaining his conviction the court below, in fact admitted, as against him, statements of his co-defendant which, as a matter of law, were not competent evidence against him.

STATUTES AND RULE INVOLVED

The pertinent statutes and Federal Rule of Criminal Procedure involved are set forth in Appendix A, *infra*, pp. 23-25.

STATEMENT

Petitioner William J. Opper and Robert George Hollifield, Sr., were jointly charged, in an indictment (R. I, 1) containing four substantive counts and a conspiracy count, with violating Title 18, U.S.C., § 281 and conspiring to violate § 281 and to defraud the United States within the meaning of Title 18, § 371. Count 1 of the indictment in substance charged that Hollifield, an employee of the United States, directly agreed to receive $1750 as compensation from petitioner for services to be rendered in relation to purchase requests in which the United States was directly interested, the services to consist of Hollifield's recommending the approval and procurement by the Air Force of the United States of certain types of sun goggles and ski goggles. Count 2 charged that on March 1, 1951, in Dayton, Ohio, Hollifield received from petitioner as compensation for the rendition of such services $50. Count 3, a charge similar to Count 2, set forth the receipt by Hollifield from petitioner of $250 on or about March 1, 1951, while Count 4, a charge similar to Counts 2 and 3, recited the receipt of approximately $200 from petitioner under similar circumstances on the 5th day of August, 1951. As to each of these counts it was charged that petitioner aided, abetted, counseled, induced and procured the defendant Hollifield unlawfully to receive such compensation for the services rendered. Title 18, U.S.C., § 2.

Count 5 charged petitioner and his co-defendant Hollifield with conspiring to commit offenses against the United States and to defraud the United States by conspiring to violate Title 18, U.S.C., Section 281, and to defraud the United States within the meaning of Title 18, U.S.C., Section 371, in that (1) they did conspire to cause Hollifield to directly receive from Opper compensation for services rendered and to be rendered by Hollifield which services would consist in Hollifield's recommending the approval and procurement by the Air Force of certain types of sun goggles and ski goggles, and (2) they did conspire to defraud the United States of and concerning its right (a) to have the lawful functions of Hollifield performed free from unlawful impairment, obstruction, collusion, partiality, improper influence, bias, dishonesty and fraud, and (b) to have Hollifield's duties performed untainted by the unlawful receipt by him of compensation from outside sources for services rendered in connection therewith. Count 5 charges that the alleged conspiracy began on or about October 1, 1950 and ended on or about September 26, 1951.

A motion for severance was denied (R. I, 14, 15) and the defendants were tried together.

The evidence established that Hollifield was employed by the United States Air Force at Wright Field, Dayton, Ohio, being a designer supervisor (aviation clothing and equipage). In this position he worked under the general supervision of the Chief, Medical Specifications Branch, with opportunity for "wide use of creative initiative and independent judgment in planning and supervising the accomplishment of land survival equipment." His duty was to review and discuss first samples produced "to de-

termine compliance with specifications." As project supervisor of survival kits, it was Hollifield's duty to pass upon the conformity to specifications of the various items in the kit, including goggles (Govt. Ex. 15, R. I, 86-88; R. III, 49-51).

A resident of Chicago and sub-contractor on various projects for the equipping of survival kits, petitioner submitted to two prime contractors compasses and goggles for the kits (Govt. Ex. 21, R. I, 135; R. III, 68-72; Govt. Ex. 30, R. III, 85-90; R. II, 609, 610). It was proved that certain goggles which had been supplied by petitioner to a prime contractor had been recommended for rejection by the Chief, Physiology Branch Aero Medical Laboratory, on January 23, 1951, because of "marked deviations" from the applicable specifications (Govt. Ex. 27, R. III, 80).

Shortly after the recommended rejection Hollifield secured a conference with Frederick Moss, a project engineer of the Physiology Branch, and other employees of the Air Force (R. I, 377, 378). Petitioner attended this conference and in his presence Hollifield urged that the goggles be accepted (R. I, 378). At the conference it was concluded that Hollifield should embody his reasons for recommending acceptance in a routing and record sheet and this was done (R. I, 378-379). The routing and record sheet (Govt. Ex. 28-a, R. III, 81) stated: "Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information." While the routing and record sheet was signed by Randall W. Briggs, it bore the

initials of Hollifield and, in asking for reconsideration, stated substantially the reasons Hollifield had advanced at the oral conference above described as to why the rejection of the goggles should be changed (Govt. Ex. 28-a; R. III, 81; R. I, 378). Reconsideration was granted and the use of the substitute goggles submitted by appellant was recommended on February 3, 1951 (Govt. Ex. 28-b; R. III, 82; R. I, 380-382).

Over the objection of the petitioner, Francis A. Regan, a Special Agent of the F.B.I., was permitted to testify concerning certain inculpatory oral statements allegedly made to him by petitioner concerning the payment of money by petitioner to the co-defendant Hollifield (R. I, 322-324). Petitioner objected, unsuccessfully, to such testimony upon the grounds that the government had not introduced any independent evidence of the *corpus delicti*[1] corroborating petitioner's inculpatory statements or admissions (R. I, 238, 240, 245, 322). The testimony of Agent Regan was that on October 10, 1951, petitioner, in the Chicago office of the F.B.I., stated, among other things, that while in the office of a business associate in Dayton, Ohio, he met the co-defendant Hollifield; that thereafter he met Hollifield on approximately fifteen occasions at Wright Field, Ohio, at Dayton, Ohio, and at Chicago, Illinois (R. I, 322); that in April, 1951, during a meeting in Chicago, Hollifield asked for money, stating he was about to lose his home; that he gave Hollifield $1000.00; that such payment constituted a loan; that petitioner admitted he had never seen Hollifield's home, that to his own knowledge he did not know that he had a home, that he did not obtain any security for the loan; that he had no receipt

[1] e. g., That petitioner had paid or agreed to pay money to Hollifield for services rendered or to be rendered.

or record to evidence the loan and that there was no agreement as to interest; that approximately two weeks following the $1000.00 payment in Chicago he met Hollifield in Dayton, Ohio, and gave him $200.00 (R. I, 323, 324).

Over petitioner's objections, upon the same grounds noted above (R. I, 326), there was admitted in evidence against petitioner (R. I, 326) a written statement signed by petitioner (Gov. Ex. 41; R. III, 101) in which petitioner, among other things, admitted paying 1200.00 to Hollifield.

There were also admitted in evidence (R. I, 264, 265, 289) against the co-defendant Hollifield, two signed confessions (Govt. Ex. 37; R. III, 97, and Govt. Ex. 38; R. III, 99). There was also admitted and read into the record, against the co-defendant Hollifield, his grand jury testimony (R. I, 299) as well as testimony concerning oral statements made by him, (R. I, 208, 255-278, 282-295) most of which contained admissions of an inculpatory nature.

Neither the signed confessions, the grand jury testimony nor the oral inculpatory statements of the co-defendant Hollifield was admitted against petitioner and the court admonished (R. I, 260, 268) and instructed (R. II, 721, 722) the jury that such evidence might be considered against Hollifield alone and not against petitioner.

At the close of the Government's evidence (R. II, 549) petitioner moved, unsuccessfully, to strike from the record the written statement signed by him (Govt. Ex. 41; R. III, 101) and the testimony concerning oral inculpatory statements allegedly made by him (R. I, 322-324) upon the

19 MARCH 1951

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FOR USE OF RESPONSIBLE COMPONENT

17. Project Engineer	18. Branch Chief	19. Approved—Lab. or Sect. Chief
Frederick Moss FREDERICK MOSS Symbol MCREXD8 Phone 2-6242	J. W. HEIM Symbol MCREXD8 Phone 2-3231	R. L. King 33125 R. L. KING, Chief, Service Br. for: W. A. CARLSON, Col, USAF (MC Date

FOR USE OF PARTICIPATING COMPONENT

20. Est. Comp. Date	21. Project Engineer	22. Work will be accomplished under Basic Field No.	23. Approved—Lab. or Sect. Chief
	Symbol Phone		

CLOSING ACTION

24. Report No.	26. Review	27. Approved—Par. Comp. Chief	28. Approved—Resp. Comp. Chief
MCREXD8	☒ Completed	M. E. DORTE Lt. Colonel, USAF Chief, Materials Laboratory	W. A. CARLSON Colonel, USAF (MC) Chief, Aero Medical Lab.
25. Date Completed 3-15-57	☐ Cancelled		

AMRD Form No. 74-69 Apr 50
Air Force MCREXD-8-47 1 Apr 50

UNCLASSIFIED

Supersedes AMRD Forms No. 73A, 73B, and 73C, which will be destroyed.

grounds that, absent his inculpatory statements and admissions, there was in the record no evidence whatsoever, competent as to him, concerning the payment of money to Hollifield or of an agreement so to pay money. At the same time petitioner moved, unsuccessfully, for judgment of acquittal upon the same grounds. At the close of all the evidence petitioner's motions aforesaid were renewed and overruled (R. II, 674).

On the afternoon of June 5, 1952, the foreman of the jury reported to the Court that the jury was unable to arrive at a verdict, whereupon the Court directed that the jury continue its deliberations (R. II, 738). At 5:18 P.M., on June 5, 1952, the Court directed the bailiff to bring in the jury, whereupon the bailiff related that the jury desired a few more minutes, and at 6:00 P.M., the jury returned verdicts finding petitioner and his co-defendant Hollifield guilty on each of the five counts of the indictment (R. I, 20). On motion of petitioner, the jury was polled, and the following interchange took place between the court, juror No. 6, Mr. Raymon Marker, and counsel for the petitioner (R. II, 741-743):

"The Clerk: Raymon Marker, is this your verdict as to Robert G. Hollifield?

Mr. Marker: I signed the paper.

The Court: That is not the answer. Is that your verdict? You may say yes or no.

Mr. Marker: I guess it is.

The Court: That is not the answer. The question is, is that your verdict? You may say yes or no.

Mr. Kelley: If your Honor please, the defense moves that this jury be sent back for further deliberation, sir.

The Court: You may answer the question, Mr. Marker, whether that is your verdict, yes or no.

Mr. Marker: Yes, I guess.

The Court: Mr. Marker, will you answer the question? Please state whether or not that is your verdict as to Robert Hollifield. Answer it yes or no.

Mr. Marker: (Hesitates) Can't I say, 'I guess'?

The Court: No, Mr. Marker, you can't say 'I guess'. You will have to say—you are being polled now and the question is whether or not this is your verdict. You must say, 'Yes, it is,' or 'No, it is not', whichever you see fit to say. It must be one or the other. You can't guess at it.

Mr. Kelley: In justice name—

The Court: Pardon me, Mr. Kelley. I am running this court. Please be seated. You answer the question yes or no, Mr. Marker, as you see fit. That is up to you.

Mr. Marker: Yes.

The Court: All right. Go to the next juror.

Mr. Kelley: May the record show the time that has taken place before this Gentleman expressed himself?

The Court: The record may show anything you please.

Mr. Kelley: May the record show many minutes passed?

The Court: I wanted to know from Mr. Marker whether this was his verdict and he said: 'Yes, it is.'

Mr. Kelley: May the record show before he responded many minutes passed and may it show that the juror has bent his head in great perturbation? May the record show that the juror is now in tears?

The Court: You will have everybody in tears, if you keep on.

Mr. Kelley: If your Honor please, may all of these remarks go upon this record?"

When polled but a few moments later as to petitioner Opper, juror Marker responded (R. II, 744):

"The Clerk: Raymon J. Marker, is this your verdict as to William J. Opper?

Mr. Marker: I said it once. Yes, Yes it is."

Thereafter, on June 10, 1952, petitioner timely filed a motion for a new trial with an attached affidavit of juror Raymon J. Marker (R. I, 21, 24). In this affidavit (R. I, 24) juror Marker, among other things, deposed:

> "In the last few minutes before the jury left the Jury Room to report its verdict,I changed my vote from "Not Guilty" to "Guilty"; one other juror was also voting for acquittal up to the last half hour. It had been intimated by two of the jurors that I had some ulterior reason for my voting. Also the Court, on the first day of the trial censored a prospective juror in severe terms for not saying earlier that he could not serve for personal reasons. I signed the verdict of "Guilty", but when I was seated in the jury box and was asked individually if it was my verdict I wanted to speak out that it was not my conscientious verdict, but I was afraid the Court would censor me or hold me in contempt of court for changing my verdict after having signed it. My conscience bothered me afterward and I sought our Harold H. Shellenberger and told him of my situation. I give this affidavit in the interest of justice and to clear my conscience."

On June 16, 1952, petitioner filed a supplemental affidavit of juror Raymon J. Marker (R. I, 25), and orally moved that the Court conduct an investigation of its own whereby all of the jurors could be interrogated as to the occurrences set forth in the affidavit and supplemental affidavit of juror Raymon J. Marker (R. II, 749).

In the supplemental affidavit juror Marker deposed:

> "Affiant says that one of the jurors in the above entitled case, at a late stage in the deliberations, demanded to know of him, 'What's in this for you?' or words to that effect; and that upon violent protest of affiant against this remark another juror said 'If the shoe fits wear it', or words to that effect.
>
> "Affiant says that he felt that he was under strong suspicion of corrupt motives in voting for acquittal; that several of his fellow jurors were extremely critical of his position.
>
> "Affiant says that the verdicts he signed were not his true verdicts and that he signed said verdicts under pressure."

The trial court, on its own motion, ordered the aforesaid affidavits stricken from the record upon the ground that they were "highly and extremely impertinent" (R. II, 755, 756).

Petitioner, on June 16, 1952, was sentenced to imprisonment for a period of two years on Count One; one year on Count Four, the sentence on Count Four to run consecutively with the sentence on Count One; one year and one day on Count Five, the sentence on Count Five to run concurrently with the sentences on Counts One and Four; to pay a fine of $500.00 on Count Two and $500.00 on Count Three (R. I, 29).

The judgment of the court below reversed the judg-

ment of the trial court as to Counts Two and Three of the indictment, affirmed as to Counts One, Four and Five and remanded the case to the District Court with instructions to dismiss Counts Two and Three of the indictment (R. II, 765, 772).

REASONS FOR GRANTING THE WRIT

This case raises significant—and disturbing—issues of criminal law that invite further scrutiny by this Court.

First, the facts reflect an improper invasion of the jury's province by the trial judge, since, although the poll showed that one juror was not in complete accord with the verdict as announced, the trial judge questioned him until a categorical answer was forthcoming. Another circuit, and every other court considering the point, has ruled that the proper course would have been a direction to the jury to retire for further deliberation.

Next, the court below ruled that an admission, unlike a confession, does not require corroboration, even when made after the fact in response to interrogation by F.B.I. agents. A recent decision here, which dispenses with corroboration only where the admission was made before the crime, looks the other way; and at least two other circuits are squarely to the contrary.

Third, the court below has upheld a conviction solely on the strength of an admission, made after the fact, without any proof of the *corpus delicti*. Every other circuit before which that question has come has unhesitatingly ruled that there must be proof, independent of such admission, of the *corpus delicti*.

And, finally, this case presents still another demonstration of the primary danger of conspiracy prosecution, viz., the impossibility in fact of protecting one defendant from the incriminatory features of confessions by his co-defendant, notwithstanding repeated admonitions that the confessions of one are inadmissible against the other.

1. A serious aspect of the present case lies in the approval given by the court below to the procedure followed by the trial judge during the poll of the jury, whereby the juror Marker, who manifestly was not ready to give his unqualified or unequivocal adherence to the verdict, was eventually induced to express his consent thereto, not as a consequence of further deliberation with his fellow jurors, but by reason of the repeated and peremptory insistence of the trial judge that he respond to the poll with a categorical answer. The ruling below on this point appears to ignore Rule 31(d), F. R. Crim. P., is directly contrary to the ruling of at least one other circuit (and of all other courts that appear to have passed on the issue), is at marked variance with hitherto approved concepts of a unanimous verdict, and lends sanction to a disturbing departure by the trial court from the accepted and usual course of proceedings in criminal cases.

The sequence of events during the poll (R. II, 741-744) has been set out above, *supra*, pp. 8-11. Juror Marker's first response, "I signed the paper", most certainly cannot be termed an unqualified assent. His next three responses to questions propounded by the judge were all qualified by "I guess" or "I guess it is"—which again show that this juror was not expressing a conviction of guilt beyond reasonable doubt. It was not until after

repeated interrogation by the trial judge that this juror finally gave, after prolonged hesitation, an answer of "Yes"—and simultaneously gave way to tears.

While these external influences were brought to bear upon this juror during the poll as to Hollifield, his answer as to the Opper verdict, "I said it once. Yes, yes it is." (R. II, 744, *supra*, p. 11) is inextricably connected with his series of uncertain answers as to the Hollifield verdict, and the one is as much tainted with coercion as the other.

The answers of juror Marker made in response to the questions asked upon the poll show that he was not in complete agreement with the verdict, or, at the very least, that he entertained grave doubts. Clearly, there was not "unanimous concurrence". Consequently, Rule 31(d), F. R. Crim. P. (*infra*, p. 25), no less than every court passing on the point, makes it clear that the jury should have been directed to retire for further deliberations.

Thus, so the District of Columbia Circuit has held, the judge should not have argued with the juror, he should have sent the entire jury back for further deliberation. *Bruce* v. *Chestnut Farms-Chevy Chase Dairy*, 126 F. 224, 225:

> "There can be no question of the right of a juror, when polled, to dissent from a verdict to which he has agreed in the jury room, and when this happens, the jury should either be discharged or returned to their room for further deliberation. It is both unwise and undesirable that the court should enter into an argument with the

> juror or require an explanation of his change of position. * * * The correct practice, when a poll of the jury is asked, is for the clerk to call the roll and ask each juror as his name is called to answer—for the plaintiff, or—for the defendant, and if the responses of the individual jurors are not in complete agreement, the jury should be required to retire and give further consideration to the case".

Similarly, in *Mattice* v. *Maryland Casualty Co.*, 5 F. 2d 233 (W. D. Wash.), one of the jurors during the poll said, "I submitted; yes". To a further inquiry as to whether it was his verdict, he said, "In a sense it was, yes"; and, thereafter, "I agreed; yes." The jury having been meanwhile discharged, Judge Neterer granted a new trial "upon the ground of the failure of the jury to agree". This decision was cited with approval by the District of Columbia Circuit in the *Bruce* case, *supra;* it would be difficult to find a state of facts closer in point to those in the case at bar.

Likewise, in *Solar* v. *United States*, 86 A. 2d 538, where one juror during the poll said, "I said not guilty and I changed to guilty in a way", and, after a further question by the judge, "Guilty, I suppose", the Municipal Court of Appeals for the District of Columbia, on the authority of the *Bruce* case, held that, when the individual juror expressed doubt, the jurors should have been sent back for further deliberation and that entry of a verdict of guilty was improper.

The opinion of the court below, which disregarded all the preliminary colloquies between the judge and juror

Marker, and simply said (R. II, 772), "The juror Raymon J. Marker three times stated in open court that the verdict was his", is not in accord with Rule 31(d), and is moreover squarely opposed to the ruling of the District of Columbia Circuit in the *Bruce* case, *supra*.

2. If review is granted as to the foregoing point, petitioner also intends to argue that it was error to strike the juror Marker's affidavits from the record (*supra*, p. 12). Without elaborating at this juncture, the contention to be made is that, while a juror may not impeach his own verdict, he may by affidavit explain a qualified assent such as "Yes, but—" (*In re Sugg's Will*, 194 N. C. 638, 140 S. E. 604), or indicate possible coercion by the court (*State* v. *Joseph*, 96 N. E. 2d 425 (Ohio App.). That is because, in the absence of unqualified assent by every juror, there is no verdict in existence, and hence nothing to impeach. This result is consistent with what this Court has said of the object of a poll (*Humphries* v. *District of Columbia*, 174 U. S. 190, 194), "to ascertain for a certainty * * * that no one has been coerced or induced to sign a verdict to which he does not fully assent", and with what it has said of impeaching affidavits by jurors (*United States* v. *Reid*, 12 How. 361, 366): "It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably, such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice".

3. Where an admission is made prior to the time of the alleged crime, it need not, under a fairly recent decision of this Court, be corroborated, because before-the-fact admissions "contain none of the inherent weaknesses

of confessions or admissions after the fact". *Warszower* v. *United States*, 312 U. S. 342, 347.

Here, all of petitioner's admissions were made after the fact. The dates alleged in the indictment that have reference to him run from October 1, 1950, to September 26, 1951 (R. I, 2, 3, 4-5, 6). His written admission (Govt. Ex. 41, R. III, 101-102; R. I, 329-331; R. II, 769-771) is dated October 16, 1951. And all of his oral admissions (R. I, 320-325, 332-333, 337-351) to the two F.B.I. agents who interrogated him were similarly made in October, 1951 (R. I, 318, 337-338, 348).

Yet the court below held (R. II, 771) that these admissions did not require corroboration.

The holding below, far from being required by the *Warszower* case, runs counter to the rationale of that decision as to the danger of after-the-fact admissions; and it is in addition in conflict with the rule followed by the other circuits that have considered the issue. *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9); *Pines* v. *United States*, 123 F. 2d 825 (C.C.A. 8); *Gulotta* v. *United States*, 113 F. 2d 683 (C.C.A. 8).

We think that the reasoning of the *Warszower* case, which analogizes after-the-fact admissions to confessions with respect to the need for corroboration, requires reversal of the judgment below; but, insofar as the question may still be open here, the existing conflict between the court below and the 8th and 9th Circuits warrants review of this case for reexamination of the underlying issue.

4. There is a further infirmity in the ruling below,

viz., the affirmance of petitioner's conviction on his after-the-fact admission alone, without any proof whatever of the *corpus delicti*.

Under the allegations of the substantive counts of the indictment, 1-4 inclusive, the elements of the *corpus delicti* are (1) the payment of money or an agreement to pay money to Hollifield for (2) services rendered or to be rendered by Hollifield to the petitioner; and in count 5, the conspiracy count, the *corpus delicti* is of course the agreement. Cf. R. II, 544-549.

Eliminating what petitioner himself said, because the inquiry is whether what he said was corroborated—eliminating what Hollifield said, for that admittedly (R. II, 769), cannot be considered against petitioner—there is in the record neither evidence of payment nor evidence of an agreement to pay, as we show, in greater detail, in Appendix B, *infra*, pp. 26-29.

Otherwise stated, there is in the present record no proof of any *corpus delicti* apart from the statements of the two defendants.

The differences of opinion between the several courts of appeal as to the quantity or degree of extra-confessional proof of the *corpus delicti* that is required [compare *Daeche* v. *United States*, 250 Fed. 566 (C.C.A. 2), with *Forte* v. *United States*, 94 F. 2d 236 (App. D. C.)] need not be resolved here, because, at the very least, the independent evidence must establish that the crime charged has been committed by someone [*United States* v. *Markman*, 193 F. 2d 574, 576 (C.A. 2); *Anderson* v. *United States*, 124 F. 2d 58 (C.C.A. 6)], and that minimum standard has not here been met.

Thus, in this case, the court below has affirmed a conviction, without independent proof of the *corpus delicti*, simply on the basis of what a defendant said and wrote to F. B. I. agents after the date of the acts charged. That result is in square conflict with the decisions of every other circuit which has up to now passed on that question. *Tingle* v. *United States*, 38 F. 2d 573, 575 (C.C.A. 8); *Naftzger* v. *United States*, 200 Fed. 494, 499 (C.C.A. 8); *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9); *Forte* v. *United States*, 94 F. 2d 236 (App. D. C.); *United States* v. *Markman*, 193 F. 2d 574 (C.A. 2); see *United States* v. *Golan*, 24 F. Supp. 523 (E.D. Pa.) (Maris, Circ. J.).[2]

Never, before the decision below, has any circuit ever ruled that a conviction can be had where the essential elements of the offense were proved only by things said by a defendant after the date of the offense charged. Even in the absence of a conflict between circuits, such a result marks a sufficient departure from hitherto accepted principles as to call for review by this Court.

5. Opinions here have several times reflected an awareness of the dangers implicit in conspiracy prosecutions. See *Krulewitch* v. *United States*, 336 U. S. 440, 445-458; *Nye & Nissen* v. *United States*, 336 U. S. 613, 625-626. The fears there voiced are shown by this record to have been well founded.

The trial judge repeatedly admonished the jury that the statements of the co-defendant Hollifield could not be used against petitioner (R. I, 260-261, 268-269,

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[2] *Perovich* v. *United States*, 205 U. S. 86, 91, relied upon by the court below (R. II, 769), holds that an admission is competent when the *corpus delicti* is independently proved, not that an admission standing alone dispenses with proof of the *corpus delicti*.

290; R. II, 444, 722). Yet the jury was still so far confused as to find petitioner guilty on Counts 2 and 3 (R. I, 20), although, as the court below held (R. II, 772), the only evidence connecting petitioner with the payments alleged in those counts was the statement of Hollifield. And the trial judge, for all his learning, was himself also so confused that, despite the absence of competent evidence against petitioner on those counts, he denied a motion for a judgment of acquittal as to these counts (R. I, 18, 19), overruled a motion for new trial (R. I, 27), and imposed sentence in respect of each of the invalid counts (R. I, 29).

Error begets error. Although the court below set aside the conviction on Counts 2 and 3 (R. II, 765, 772), it was itself similarly confused as to what evidence was admissible against petitioner, as we point out in more detail in Appendix B, *infra*, with the consequence, already demonstrated, that petitioner's conviction on the remaining counts has been affirmed without any competent independent proof of the *corpus delicti*.

It is commonplace in psychology that the ability of the human mind to compartmentalize and insulate particular bits of knowledge is limited. But where that inability has dire consequences to an individual, where the mind's inability to apply fact A only to defendant X actually makes that inadmissible evidence seal the doom of defendant Y, we pass from the realm of psychology to that of law. And where the confusion of evidence affects not only lay jurors but also "the distinguished and experienced trial judge who heard the case" (R. II, 769), and is shown moreover to have infected the very reasoning of an entire court of appeals, then, we submit, it is appropriate for this

Court to grant review, to the end that the abuses which the present record reflects be remedied, and their repetition precluded.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX A

STATUTES AND RULE INVOLVED

Title 18, Section 281, United States Code. *Compensation to Members of Congress, officers and others in matters affecting the Government.*

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Retired officers of the Army, Navy, Marine Corps, and Coast Guard of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

This section shall not apply to any person because of his membership in the National Guard of the District of

Columbia nor to any person specially excepted by Act of Congress.

Title 18, Section 2, United States Code.

Principals.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Title 18, Section 371, United States Code. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Federal Rules of Criminal Procedure

Rule 31. *Verdict.*

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

* * * * *

(d) Poll of the Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

APPENDIX B

SUMMARY OF EVIDENCE BEARING ON THE CORPUS DELICTI

What follows is a documentation of an assertion in the body of the petition (*supra*, p. 21) that there is in the present record no evidence independent of petitioner's after-the-fact admissions proving the *corpus delicti*.

1. The court below, in summarizing the evidence stated in its opinion (R. II, 767, 768) that petitioner, a sub-contractor on various projects for the equipping of survival kits[1] submitted to two prime contractors com-

[1] A comprehensive article made up of a number of components such as a compass, raincoat, goggles, machette and necessary life saving equipment. (R. I, 129)

passes and goggles for the kits; that certain goggles which had been supplied by petitioner to a prime contractor had been recommended for rejection by the Chief, Physiology Branch, Aero Medical Laboratory, on January 23, 1951 because of "marked deviations" from the applicable specifications; that petitioner's co-defendant, Hollifield, was employed by the United States Air Force at Wright Field, Dayton, Ohio, being a designer supervisor (aviation clothing and equippage); that he worked in this position under the Chief, Medical Specifications Branch, with opportunity for "wide use of creative, initiative and independent judgment in placing and supervising the accomplishment of land survival equipment"; that his duty was to review and discuss first samples produced "to determine compliance with specifications"; that as project supervisor of survival kits, it was Hollifield's duty to pass upon the conformity to specifications of the various items in the kit, including goggles; that shortly after the recommended rejection Hollifield secured a conference with Frederick Moss, a project engineer of the Physiology Branch, and other employes of the Air Force; that petitioner attended this conference and in his presence Hollifield argued that the goggles be accepted; that at the conference it was concluded that Hollifield should embody his reasons for recommending acceptance in a routing and record sheet and this was done; that the routing and record sheet stated: "Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information"; that while the routing and record sheet was signed by Randall W. Briggs, it bore the initials of Hollifield and, in asking

for reconsideration, stated substantially the reasons Hollifield had advanced at the oral conference above described as to why the rejection of the goggles should be changed; that reconsideration was granted and the use of the substitute goggles submitted by appellant was recommended on February 3, 1951.

2. Petitioner acknowledges that the evidence summarized immediately above was adduced from sources independent of petitioner's inculpatory admissions. But petitioner submits that none of such evidence establishes or could give rise to a reasonable inference that anyone, petitioner included, paid or agreed to pay money to Hollifield—and it is the payment or agreement to pay that constitutes the *corpus delicti* in this case.

3. The court below, in its summary of the evidence (R. II, 767) further stated that "appellant had been acquainted with Hollifield for several months, having met him in October, 1950, and having seen him some fifteen times during the period involved."

In fact, however, there is no independent evidence that petitioner saw Hollifield some fifteen times during the period involved. The sole source of this statement is the testimony of Francis A. Regan, Special Agent of the F.B.I., who testified (R. I, 322) that petitioner orally admitted to him that he met Hollifield on approximately fifteen occasions. Petitioner acknowledges that the record does contain independent evidence that on a single occasion (January 23 or 24, 1951) he attended a meeting at Wright Field at which meeting there were present Hollifield, Norris N. Murray, O. T. Strand and F. Moss (the latter three being officers at Wright Field) and a sixth

man whose identity was not disclosed (R. I, 377, 378). Apart from the inculpatory statements of Hollifield, which may not be considered against Opper for any purpose, and apart from Opper's inculpatory admissions there is no evidence whatsoever in the record that Opper and Hollifield ever met save and except for the one meeting of January 23 or 24, 1951, noted above, attended by Strand, Murray, Moss and the unknown man.

4. The court below in its summary of the evidence (R. II, 767) referring to the rejection of certain goggles supplied by petitioner, recited further: "Hollifield, as admitted by appellant, had discussed this matter with appellant." There is in the record of the case no independent evidence of such discussion.

5. In addition to the evidence thus summarized by the court below, there were but three items of independent evidence, which might be said to relate remotely, if at all, to the payment of money, viz.,

a) That on April 14, 1951, Hollifield went to the City of Chicago (R. II, 420-423);

b) That on April 13, 1951, a telephone call was made from the Hollifield residence in Dayton, Ohio, to the Opper residence in Chicago (R. I, 414; R. II, 417); and

c) That a check for $1000.00 was drawn by Opper on April 13, 1951, and was cashed by Opper on April 16, 1951 (R. II, 425-427) (Govt. Ex. 42; R. III, 103; R. I, 333-336, R. III, 426).

But, (a) There is no independent evidence that Hollifield met or communicated with Opper while in Chicago;

(b) There is no independent evidence as to who, if any one, conversed, or whether the conversation related to business or social matters; and,

(c) There is nothing upon said check and no independent evidence to identify said check with Hollifield; Opper's bank ledger sheets (Govt. Ex. 43; R. III, 104-106; R. I, 337) demonstrate that within two and one-half months of April 16, 1951, Opper cashed fifteen other checks amounting to or exceeding $1,000.00. Please note, in this connection, a typographical error appearing at the bottom of page 523 in the Record, which reads: " • • • a check . . . with Hollifield's name on it . . ." and which should properly read: " • • • a check . . . without Hollifield's name on it . . . "

6. Under the crime charged against petitioner in each count of the indictment, the elements of the *corpus delicti* obviously consist of (1) the payment of money or an agreement to pay money to Hollifield for (2) services rendered or to be rendered by Hollifield to petitioner.

Thus it is abundantly manifest that there is in this record no independent evidence that anyone paid or agreed to pay money to Hollifield. Consequently, as was said in the text, (*infra*, p. 21), there is in this record no independent evidence of the *corpus delicti*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 49

WILLIAM J. OFFER, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE PETITIONER

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IN THE

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WILLIAM J. OPPER, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 766-772) is reported at 211 F. 2d 719.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1954 (R. 766). The petition for a writ of cer-

tiorari was filed on April 24, 1954, and granted on June 7, 1954 (R. 775). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1) and former Rule 37(b)(2), F. R. Crim. P.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix hereto *infra*, pp. 36-37.

QUESTIONS PRESENTED[1]

1. Whether, where an admission is made to law enforcement officers after the date of the acts charged as crimes, it is to be so far treated as a confession that, in the absence of corroboration, it is inadmissible.

2. Whether a conviction can be sustained where there is, apart from an admission made to law enforcement officers after the date of the acts charged as crimes, no proof of the *corpus delicti*.

3. Whether, in convicting petitioner the jury, and in sustaining his conviction the court below, in fact admitted, as against him, statements of his co-defendant which, as a matter of law, were not competent evidence against him.

STATEMENT

Petitioner William J. Opper and Robert George Hollifield, Sr., were jointly charged, in an indictment (R. 1-10) containing four substantive counts and a conspiracy count, with violating 18 U. S. C. § 281 (*infra*, p. 36) and with conspiring to violate § 281 and to defraud the United States within the meaning of 18 U. S. C. § 371 (*infra*, p. 37).

Count 1 of the indictment in substance charged that Hollifield, an employee of the United States, directly agreed to receive $1750.00 as compensation from petitioner for services to be rendered in relation to purchase requests in which the United States was directly interested, the serv-

[1] Only the questions in respect of which review was granted (R. 775) are here set out.

ices to consist of Hollifield's recommending the approval and procurement by the Air Force of the United States of certain types of sun goggles and ski goggles. Count 2 charged that on March 1, 1951, in Dayton, Ohio, Hollifield received from petitioner as compensation for the rendition of such services $50.00. Count 3, a charge similar to Count 2, set forth the receipt by Hollifield from petitioner of $250.00 on or about March 1, 1951, while Count 4, a charge similar to Counts 2 and 3, recited the receipt of approximately $200.00 from petitioner under similar circumstances on the 5th day of August 1951. As to each of these counts it was charged that petitioner aided, abetted, counseled, induced and procured the defendant Hollifield unlawfully to receive such compensation for the services rendered, in violation of 18 U. S. C. § 2 (*infra*, p. 36).

Count 5 charged petitioner and his co-defendant Hollifield with conspiring to commit offenses against the United States and to defraud the United States by conspiring to violate 18 U. S. C. § 281, and to defraud the United States within the meaning of 18 U. S. C. § 371, in that (1) they did conspire to cause Hollifield to directly receive from Opper compensation for services rendered and to be rendered by Hollifield which services would consist in Hollifield's recommending the approval and procurement by the Air Force of certain types of sun goggles and ski goggles, and (2) they did conspire to defraud the United States of and concerning its right (a) to have the lawful functions of Hollifield performed free from unlawful impairment, obstruction, collusion, partiality, improper influence, bias, dishonesty and fraud, and (b) to have Hollifield's duties performed untainted by the unlawful receipt by him of compensation from outside sources for services rendered in connection therewith. Count 5 charges that the alleged conspiracy began on or about October 1, 1950 and ended on or about September 26, 1951.

A motion for severance was denied (R. 14, 15) and the defendants were tried together.

The evidence established that Hollifield was employed by the United States Air Force at Wright Field, Dayton, Ohio, being a designer supervisor (aviation clothing and equipage). In this position he worked under the general supervision of the Chief, Medical Specifications Branch, with opportunity for "wide use of creative initiative and independent judgment in planning and supervising the accomplishment of land survival equipment." His duty was to review and discuss first samples produced "to determine compliance with specifications." As project supervisor of survival kits,[2] it was Hollifield's duty to pass upon the conformity to specifications of the various items in the kit, including goggles (Govt. Ex. 15, R. 90, RE 49-51;[3] R. 86-90).

Petitioner, a resident of Chicago and a sub-contractor on various projects for the equipping of survival kits, submitted to two prime contractors compasses and goggles for the kits (Govt. Ex. 21, R. 135, RE 68-72; Govt. Ex. 30, R. 176, RE 85-90; R. 609-610). It was proved that, on January 23, 1951, certain goggles which had been supplied by petitioner to a prime contractor had been recommended for rejection by the Chief, Physiology Branch Aero Medical Laboratory, because of "marked deviations" from the applicable specification (Govt. Ex. 27, R. 376, RE 80; R. 168, 374-377).

Shortly after the recommended rejection, Hollifield secured a conference with Lieut. Frederick Moss, a project engineer of the Physiology Branch, and other employees of the Air Force (R. 377, 378). Petitioner attended this conference and in his presence Hollifield urged that the goggles be accepted (R. 378). At the conference it was

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[2] A comprehensive article made up of a number of components such as a compass, raincoat, goggles, machete, and necessary life saving equipment (R. 129).

[3] "RE" refers to Volume III of the Record which contains the exhibits, the pagination of which does not follow consecutively that of Volumes I and II. This designation of Vol. III as "RE" follows the scheme used in the Government's Brief in Opposition herein at the last Term.

concluded that Hollifield should embody his reasons for recommending acceptance in a routing and record sheet and this was done (R. 378-379). The routing and record sheet (Govt. Ex. 28-a, R. 362, RE 81; R. 379-382) stated: "Confirming conversation between F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialities Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information." While the routing and record sheet was signed by Randall W. Briggs, it bore the initials of Hollifield and, in asking for reconsideration, stated substantially the reasons Hollifield had advanced at the oral conference above described as to why the rejection of the goggles should be changed (Govt. Ex. 28a, R. 362, RE 81; R. 379-382). Reconsideration was granted and the use of the substitute goggles submitted by petitioner was recommended on February 3, 1951 (Govt. Ex. 28-b, R. 382, RE 82; R. 380-382).

Over the objection of the petitioner, **Francis A. Regan,** a Special Agent of the F.B.I., was permitted to testify concerning certain oral admissions made to him by petitioner concerning the payment by petitioner to the co-defendant Hollifield (R. 322-324). Petitioner objected, unsuccessfully, to such testimony upon the grounds that the government had not introduced any independent evidence of the *corpus delicti*[4] corroborating petitioner's statements or admissions (R. 238, 240, 245, 322). Agent Regan testified that on October 10, 1951, petitioner, in the Chicago office of the F.B.I., stated, among other things, that while in the office of a business associate in Dayton, Ohio, he met the co-defendant Hollifield; that thereafter he met Hollifield on approximately fifteen occasions at Wright Field, Ohio, and at Chicago, Illinois (R. 322); that in April, 1951, during a meeting in Chicago, Hollifield asked for money,

[4] I.e., that petitioner had paid or agreed to pay money to Hollifield for services rendered or to be rendered.

stating he was about to lose his home; that he gave Hollifield $1000.00; that such payment constituted a loan; that petitioner admitted he had never seen Hollifield's home, that to his own knowledge he did not know that he had a home, that he did not obtain any security for the loan; that he had no receipt or record to evidence the loan and that there was no agreement as to interest; that approximately two weeks following the $1000.00 payment to Hollifield in Chicago he met Hollifield in Dayton, Ohio, and gave him $200.00 (R. 323-324).

Over petitioner's objections (R. 326), upon the same grounds noted above, there was admitted in evidence against petitioner a written statement signed by petitioner (Govt. Ex. 41, R. 326, RE 101) in which petitioner, among other things, admitted paying $1200.00 to Hollifield.

There were also admitted in evidence (R. 264-265, 289) against the co-defendant Hollifield two signed confessions (Govt. Ex. 37, R. 266, RE 97-98; and Govt. Ex. 38, R. 290, RE 99-100). There was also admitted and read into the record, against the co-defendant Hollifield, his grand jury testimony (R. 299-317) as well as testimony concerning oral statements made by him (R. 208, 255-278, 282-295), most of which contained admissions of an incriminating nature.

Neither the signed confessions, the grand jury testimony, nor the oral incriminating statements of the co-defendant Hollifield were admitted against petitioner, and the court admonished (R. 260, 268) and instructed (R. 721-722) the jury that such evidence might be considered against Hollifield alone and could not be considered against petitioner.

At the close of the Government's evidence petitioner moved, unsuccessfully, to strike from the record the written statement signed by him (Govt. Ex. 41, R. 326, RE 101; R. 325-326) and the testimony concerning oral statements allegedly made by him upon the gounds that, in the absence of his oral and written admissions, there was in the record no evidence whatsoever, competent as to him, concerning

the payment of money to Hollifield or of an agreement so to pay money (R. 519, 549). At the same time petitioner moved, unsuccessfully, for judgment of acquittal upon the same grounds (R. 16, 17, 550, 554). At the close of all the evidence, petitioner's motions were renewed and again overruled (R. 674).

Petitioner, on June 16, 1952, was sentenced to imprisonment for a period of two years on Count 1; one year on Count 4, the sentence on Count 4 to run consecutively with the sentence on Count 1; one year and one day on Count 5, the sentence on Count 5 to run concurrently with the sentences on Counts 1 and 4; and to pay a fine of $500.00 on Count 2 and $500.00 on Count 3 (R. 29).

The judgment of the court below reversed the judgment of the trial court as to Counts 2 and 3 of the indictment, on the ground that the only evidence connecting petitioner with the offenses therein charged was in Hollifield's statements, which were inadmissible against him. But it affirmed the judgment as to the remaining counts and remanded the case to the District Court for resentencing. (R. 765-772.)

This Court granted certiorari (R. 775), limited to the questions set out at p. 2, *supra*.

SUMMARY OF ARGUMENT

1. *Warszower* v. *United States*, 312 U. S. 342, holds that admissions made prior to the time of the alleged crime need not be corroborated, because such admissions "contain none of the inherent weaknesses of confessions or admissions after the fact." Thus the rationale of that case undercuts the ruling below, which held that petitioner's after-the-fact admissions did not require corroboration. And other decisions here analogize confessions and admissions after the fact where, as in this case, such admissions are used to supply proof of essential elements of the offenses charged. On reason and authority both, therefore, an after-the-fact admission stands on the same footing as

a confession with respect to the need for corroboration, particularly when, as in the case at bar, there would be no proof of the commission of the crime without such admission.

2.A. The quantum of the corroborative proof that is necessary has never been indicated in any decision of this Court. In the lower federal courts, one line of decisions holds that it is sufficient if the corroborating proof fortifies the truth of the confession, and if it together with the confession or admission establishes the commission of the crime. The prevalence of forced confessions led to another and stricter rule, which requires independent proof of substantial evidence touching and tending to prove each of the main elements or constituent parts of the *corpus delicti*. A third variant, which is usually an application of the strict rule, states that the corroborating evidence must prove that an offense was probably committed by someone. The cases are not always clear, and some circuits have ruled both ways on the issue; but at this time most circuits where the question has arisen apply the strict rule. Military decisions have moved from the loose to the strict rule, and the Court of Military Appeals has squarely held that the entire *corpus delicti*, including the *scienter*, must be proved independently of what the accused said or wrote.

B. In this case, the *corpus delicti* as to the substantive counts is the payment of money or an agreement to pay money for services rendered or to be rendered; and as to the conspiracy count the *corpus delicti* is the agreement. Apart from what petitioner and his co-defendant said—and the latter is concededly inadmissible against petitioner—this record contains no proof of the *corpus delicti* of the offenses as to which petitioner's conviction was affirmed.

C. The adoption of the strict rule of corroboration resulted from judicial experience with improperly obtained confessions—and such confessions are still prevalent, as

this Court's reports show. There is therefore every reason to adopt the strict rule of corroboration, in order to discourage the obtaining of confessions and after-the-fact admissions by improper means, thus forcing law enforcement officials to concentrate on securing evidence of crime independent of any statements made to them by accused persons. Surely this Court should not adopt for criminal trials in federal district courts a standard that affords a defendant less protection than is accorded to an accused before a court-martial.

3. Despite repeated admonitions and instructions to the jury by the trial judge that Hollifield's statements were inadmissible against petitioner, the jury convicted petitioner on Counts 2 and 3; and the trial judge denied motions for acquittal and for a new trial and imposed sentence thereon—although, as the court below held, setting aside petitioner's conviction on those counts, only Hollifield's statements connected petitioner with them. But, in sustaining petitioner's conviction on the other counts, as to which there was no independent proof apart from his own admissions, the court below may yet have been influenced by what Hollifield said.

The risk that particular defendants will be prejudiced in fact by declarations which are inadmissible against them in point of law is perhaps inherent in prosecutions for conspiracy; but that danger can be minimized by requiring that the declarations of any co-defendant must be corroborated by independent evidence of the *corpus delicti* in order to be admissible. Thus the emphasis would shift to trustworthy independent evidence.

Accordingly, adoption of the strict rule for corroborating confessions and after-the-fact admissions would not only discourage the obtaining of improper confessions, it would also minimize the dangers now inevitable in prosecutions for conspiracy.

ARGUMENT

Under the order entered at the close of the last Term (J. Sup. Ct., Oct. T. 1953, p. 245; R. 775), this case is assigned for argument following the four causes that involve convictions for income-tax evasion by use of the so-called "net worth" theory. *Friedberg* v. *United States*, No. 18; *United States* v. *Calderon*, No. 25; *Holland* v. *United States*, No. 37; *Smith* v. *United States*, No. 52 (No. 726, Oct. T. 1953).

But the present case presents more fundamental problems of evidence and of criminal law than do those others. Whether the "net worth" theory can ever be a proper mode of proving income-tax evasion, or whether its use improperly shifts the burden of proof to a defendant in such cases (compare *United States* v. *Johnson*, 319 U. S. 503, 517, with e. g., *Demetree* v. *United States*, 207 F. 2d 892 (C.A. 5); *United States* v. *Caserta*, 199 F. 2d 905 (C.A. 3); and *United States* v. *Fenwick*, 177 F. 2d 488 (C.A. 7)), does not control decision here, and any determination made adversely to *Friedberg*, *Calderon*, *Holland*, and *Smith* on that issue would not require affirmance of the present conviction.

True, if it were held in *Calderon* and *Smith* that the admissions there involved would be admissible only if fully corroborated by independent evidence, then that holding would benefit this petitioner; but the converse does not follow, as the present case is distinguishable from all of the others raising the admissions point.

Thus, in *Calderon*, where the issue is whether the defendant's admission as to the amount of cash which he had on hand at the starting point of the computation was held insufficient to support the conviction in the absence of independent proof of that fact (see opinion below in that case, 207 F. 2d 377, 378), the Government said in its Petition for Certiorari (No. 577, Oct. T. 1953, Pet. 7), "The amount of cash on hand is not in itself either the *corpus delicti* or an essential element of the offense of willful tax evasion." Here, on the other hand, as we point out below,

pp. 24-28, petitioner's admissions supply essential elements of the offenses of which he stands convicted, and supply the only proof in this record of the *corpus delicti* thereof.

Similarly, in *Goldbaum* v. *United States*, No. 12—which is one of the three "net worth" cases restored to the docket on the last day of the 1953 Term after a denial of certiorari earlier in that Term (347 U. S. 1007)—it was pointed out by the Government that the admissions involved in that case were made before the date of the offense there in question, and were moreover not made to law enforcement officers (Br. Op. 19-20, No. 164, Oct. T. 1953). Here, on the other hand (*infra*, pp. 11-12), the admissions on which petitioner's conviction rests were made to F.B.I. agents after the date of the acts charged against him.

Rulings unfavorable to the defendants on the admissions point in the "net worth" cases would therefore not require affirmance here.

I. WHERE AN ADMISSION IS MADE TO LAW ENFORCEMENT OFFICERS AFTER THE DATE OF THE ACTS CHARGED AS CRIMES, IT MUST BE TREATED AS A CONFESSION, AND ACCORDINGLY IT IS INADMISSIBLE UNLESS CORROBORATED.

The starting point under this heading is *Warszower* v. *United States*, 312 U. S. 342, where this Court held squarely that admissions made prior to the time of the alleged crime need not be corroborated.

In the present case, all of petitioner's admissions were made after the fact. The dates alleged in the indictment that have reference to 'im run from October 1, 1950, to September 26, 1951 (R. 2, 3, 4-5, 6). His written admission (Govt. Ex. 41, R. 326, RE 101-102; R. 329-331, 769-771) is dated October 16, 1951. And all of his oral admissions (R. 320-325, 332-333, 337-351) were made to two F.B.I. agents who interrogated him in October, 1951 (R. 318, 337-338, 348).

The circumstances surrounding the making of the admissions are clearly set forth in the record. Petitioner was

requested to come to the Chicago office of the F.B.I. and he was there interrogated by Agent Regan and Agent Donaldson. He was told that the agents were interested in discussing with him any transactions that he may have had with Hollifield and that "it was possible that in discussing these transactions that he could involve himself in something and that he should be aware of that." (R. 318, 319.) Agent Regan further testified, "I asked Mr. Opper if Mr. Hollifield had ever solicited or asked for funds, money of any kind. Mr. Opper said 'That is a difficult question to answer. Is there any difference between giving money and loaning money?' I then asked Mr. Opper if he had given money to Robert Hollifield for any purposes whatsoever" (R. 321). At a subsequent interrogation in the same place, attended by Agents Regan and Donaldson, petitioner made the oral admissions (R. 322-324) that were admitted in evidence against him and, at Agent Regan's request (R. 324), later delivered to him the written statement in which he admitted having paid $1,200.00 to Hollifield (Govt. Ex. 41, R. 326, RE 101-102; R. 325).

The court below held (R. 771) that these admissions did not require corroboration.

We submit that this holding, far from being required by *Warszower*, is diametrically opposed to the rationale of that decision. This Court there said (312 U. S. at 347),

> The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact.

In other words, this Court in *Warszower* treated admissions after the fact on the same footing as confessions

with respect to the need for corroboration because of the "inherent weaknesses" of both.

It is interesting to note that in the *Warszower* case the identity between confessions and admissions after the fact in the foregoing connection was urged on the Court by the Government. The United States said on that occasion (U.S. Br., No. 338, Oct. T. 1940, pp. 21-22):

> It is the Government's contention that independent evidence is required only in the case of confessions, *and of admissions made after the event and in the context of conversations, interviews, and proceedings relating to the offense itself. The theory of this position squares with the purpose of the rule requiring corroboration.* For the object of that rule, in the words of the Circuit Court of Appeals in the instant case, is "protection against the risks of an untrue confession, coerced or psychopathic" [133 F. 2d at 100]. The declarations by the petitioner, relied upon by the Government, were made on occasions long before the date of the offenses alleged and in connection with proceedings wholly unrelated to those which formed the basis of this indictment. They were made under circumstances which give no cause for anxiety that they were involuntary or psychopathic. [Italics added.]

And, as we indicated in our Petition (p. 18), two circuits have applied the corroboration rule to admissions after the fact. *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9), now pending on certiorari, No. 25;[5] *Pines* v. *United States*, 123 F. 2d 825 (C.C.A. 8); *Gulotta* v. *United States*, 113 F. 2d 683 (C.C.A. 8);[6] compare *United States* v. *Golan*, 24 F. Supp. 523 (E.D. Pa.; Maris, Circ. J.).

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[5] There, however, as we have noted (*supra*, pp. 11-12), the admission, unlike the one here in issue, covered neither the *corpus delicti*, nor an essential element of the offense.

[6] "* * * there is no sound reason why an uncorroborated voluntary admission of some element of crime should be given greater force as evidence of guilt than is accorded the accused's outright confession of the crime itself." 113 F. 2d at 686.

But the rule for which petitioner contends here does not rest either on a counting of circuits or the scoring of debating points on the basis of what former law officers of the Government said in years past. It is the cases decided by this Court that support the treatment of admissions after the fact on the same footing as confessions.

Thus, in *Wilson* v. *United States*, 162 U. S. 613, 621-622, this Court said:

> Although his answers to the questions did not constitute a confession of guilt, *yet he thereby made disclosures which furnished the basis of attack*, and whose admissibility may properly be passed on in the light of the rules applicable to confessions. Of course, all verbal admissions must be received with caution, though free, deliberate and voluntary confessions of guilt are entitled to great weight. [Italics added.]

Similarly, in *Bram* v. *United States*, 168 U. S. 532, the Court said (pp. 541, 542):

> "The rule [against involuntary statements] excludes not only direct confessions, but *any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess.*" [Italics added.]
>
> * * * * *
>
> The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then after procuring its admission claiming that it did not tend to prove guilt, and could not, therefore, have been prejudicial, has been well stated by the Supreme Court of North Carolina, *State* v. *Rorie* (1876) 74 N. C. 148:
>
> > "But the State says this was a denial of guilt and not a confession. It was a declaration which the State used to procure a conviction; and it is not for the State to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precludes the State from saying that it was not used to his prejudice." (p. 151.)

The foregoing completely disposes of the distinction sought to be drawn by the Government in this case (Br. Op. 14-15), between inculpatory and exculpatory statements. That distinction smacks of artificiality, recalling the now largely abandoned distinctions between intrinsic and extrinsic fraud. Cf. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238; *Knauer* v. *United States*, 328 U. S. 654. As the *Wilson* and *Bram* cases indicate, the test of the statement is the use sought to be made of it; and where, as in this case, an admission is used to supply proof—the sole proof—of essential elements of the offense charged, then it stands on the same footing as an outright admission of guilt. After all, without the admission there could and would be no proof of guilt. Even Wigmore recognized this; see 3 Wigmore, *Evidence* (3d ed. 1940) § 821, p. 238: "A confession is *an acknowledgment in express words*, by the accused in a criminal case, *of the truth of the guilty fact charged* or *of some essential part of* it." [Italics in original.] (We say, "Even Wigmore", because of the late Dean's view that there should be no definite rule forbidding conviction of an accused in a criminal case upon his uncorroborated confession. See 7 *id.*, §§ 2070-2071.)

See also *Ballew* v. *United States*, 160 U. S. 187, 193, where the Court held that a particular statement was neither "a confession or in the nature of a confession" because "It had no tendency to establish his guilt or to operate to his prejudice."

Finally, this Court has held that, where statements are obtained by law enforcement officers from persons unlawfully detained, such statements are inadmissible in a federal court regardless of their nature That rule, first applied to confessions in *Anderson* v. *United States*, 318 U. S. 350, was similarly applied to admissions in *McNabb* v. *United States*, 318 U. S. 332. We do not contend for a moment that the present petitioner was unlawfully detained; we cite the *Anderson* and *McNabb* cases simply to show that, in the view of this Court, the distinction which the Govern-

ment now (Br. Op. 14) seeks to establish between admissions after-the-fact and confessions is without foundation in law.

We assert with confidence, therefore, that the decisions of this Court support the rule for which petitioner contends and which the Government urged in *Warszower*, namely, that independent corroborating evidence is required, not only in the case of confessions, but also in the case of "admissions made after the event and in the context of conversations, interviews, and proceedings relating to the offense itself." Petitioner's admissions here (Govt. Ex. 41, R. 326, RE 101-102; R. 320-325, 329-333, 337-351, 769-771) were plainly of that nature.

Consequently, unless those admissions were properly corroborated by independent evidence, they were inadmissible, and petitioner's motion to strike them from the record (R. 519, 549) should have been granted.

We turn, therefore, to the next issue, namely, what is the scope and nature of the corroborating testimony prerequisite for the introduction of confessions and admissions after the fact.[7]

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[7] We do not pause to analyze the state decisions relied on by the Court below (R. 771) for the proposition that exculpatory statements denying guilt are not confessions (*State* v. *Gilman*, 51 Me. 206, 225; *State* v. *Cadotte*, 17 Mont. 315; *State* v. *Novak*, 109 Iowa 717; *People* v. *Kristy*, 111 Cal. App. 2d 695; *Bruner* v. *People*, 113 Colo. 194; *People* v. *Porter*, 269 Mich. 284). Not only are those rulings not controlling here, but none considers the present question whether admissions in the nature of exculpatory statements but still admitting some essential part of the offense charged require corroboration.

II. A CONVICTION CANNOT BE SUSTAINED WHERE, AS HERE, THERE IS NO PROOF OF THE CORPUS DELICTI AND NO PROOF THAT ANY CRIME WAS COMMITTED BY ANYONE, INDEPENDENT OF AN ADMISSION MADE TO LAW ENFORCEMENT OFFICERS BY THE PETITIONER AFTER THE DATE OF THE ACTS CHARGED AS CRIMES.

The basic infirmity in the ruling below lies in its affirmance of petitioner's conviction on his after-the-fact admission, without any independent proof whatever of the *corpus delicti*, and without any independent proof that the crimes charged were committed by anyone.

Under the allegations of the substantive counts, 1-4 inclusive (R. 1-6), the elements of the *corpus delicti* are (a) the payment of money or an agreement to pay money to Hollifield for (b) services rendered or to be rendered by Hollifield to the petitioner; and in Count 5 (R. 6-10), the conspiracy count, the *corpus delicti* is of course the agreement. Cf. R. 544-549.

Eliminating what Hollifield said, for that, admittedly (R. 769), cannot be considered against the petitioner—eliminating what petitioner himself said, because the inquiry under the present heading is whether that was sufficiently corroborated to be admissible—there is in this record, as we point out presently in greater detail, neither evidence of payment nor evidence of an agreement to pay.

Otherwise stated, there is in the record in this case no proof of the *corpus delicti*, and no proof of the commission of any crime, apart from the statements of the two defendants. And so we turn to consider whether and to what extent extra-confessional proof of the *corpus delicti* is required—and we say "extra-confessional" in view of the rule discussed above, pp. 11-16, which analogizes admissions after the fact to confessions for this purpose.

A. The lower federal courts now tend to require extra-confessional proof of the corpus delicti in order to render admissible a confession or an after-the-fact admission.

This Court has hardly spoken on the present question.[8] There is some recognition in *Isaacs* v. *United States*, 159 U. S. 487, of the rule for which petitioner contends, but hardly a square holding, besides which there was in that case (159 U. S. at 490) "abundant evidence in the case outside of defendant's confession, not only that the man had been murdered, but considerable evidence that he was a white man". And in *Perovich* v. *United States*, 205 U. S. 86, 91, relied upon by the court below (R. 769), the holding was that an admission was competent when the *corpus delicti* was independently proved, not that an admission can by itself supply proof of the *corpus delicti*.

There has actually never been a holding in this Court as to the quantity or degree of extra-confessional proof of the *corpus delicti* that is required.

In the lower federal courts, it has hardly been doubted that some corroboration of a confession is necessary, and in the earlier cases the requirement ranged from "corroborative evidence tending to prove the facts embraced in the confession" (*United States* v. *Williams*, 1 Cliff. 5, 28, Fed. Case No. 16,707, 28 Fed. Cas. at 645, *per* Clifford, Circuit Justice; *Daeche* v. *United States*, 250 Fed. 566, 571 (C.C.A. 2)), to a square holding that the evidence of the *corpus delicti* "must be other than things said and done by the defendant" (*Naftzger* v. *United States*, 200 Fed. 494, 499 (C.C.A. 8)).

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[8] In *United States* v. *Wood*, 14 Pet. 430, the issue was whether a signed statement by the defendant, in the absence of a live witness against him, was sufficient to prove the *corpus delicti* in a perjury case; held yes. In *St. Clair* v. *United States*, 154 U.S. 134, it was held that the *corpus delicti* in a case of homicide on the high seas was sufficiently proved by evidence of the victim's disappearance, and that it was not necessary to produce the victim's body.

The *Daeche* case, where L. Hand, D.J. (as he then was), spoke for the Second Circuit, was decided in 1918. Its holding (250 Fed. at 571) that "any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession", and that "Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of truth", was followed in other circuits, one suspects rather more because of the eminence of the writer than in consequence of any independent analysis of the problem. E. g., *Pearlman* v. *United States*, 10 F. 2d 460 (C.C.A. 9); *Wynkoop* v. *United States*, 22 F. 2d 799 (C.C.A. 9); *Jordan* v. *United States*, 60 F. 2d 4 (C.C.A. 4), certiorari denied, 287 U. S. 633.

Not until *Forte* v. *United States*, 94 F. 2d 236 (App. D. C.), was the rule reexamined, and then the *Daeche* doctrine was rejected; the court held that the prosecution must, independent of the confession, prove the *corpus delicti*, including the *scienter*, by substantial evidence. Only the accused's connection with the crime may be shown by the confession alone. This has since remained the rule in the District of Columbia (see *George* v. *United States*, 125 F. 2d 559; *Ercoli* v. *United States*, 131 F. 2d 354; *Sesso* v. *United States*, 133 F. 2d 381).

The basis for the change from *Daeche* to *Forte* in the nineteen years that separated them was what had been learned in the interim, *viz.*, that the practice of forcing confessions was widespread in the United States; in this connection, the court in *Forte* cited the Report on Lawlessness in Law Enforcement of the National Commission on Law Observance and Enforcement; Yankwich *The Lawless Enforcement of the Law* (1935) 9 So. Calif. L. Rev. 14; and Note, *The Third Degree* (1930) 45 Harv. L. Rev. 617. The court said (94 F. 2d at 240):

> The question presented is of first impression here; and we feel bound upon a subject touching so materially liberty, and in many cases life itself, and especially

> in the criminal law where justice requires equality of treatment in respect of trial procedure and proof, to give weight to the findings of the National Commission, and to follow in adopting a rule for this jurisdiction the rule of the great majority of the courts of the United States—that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the *corpus delicti* and the whole thereof. We do not rule that such corroborating evidence must, independent of the confession, establish the *corpus delicti* beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the *corpus delicti* and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith.

Thus the rule of the *Forte* case exemplifies Holmes' timeless apothegm (*The Common Law*, 1) that "The life of the law has not been logic: it has been experience." And so the *Forte* rule has been followed in other circuits. See *Oldstein* v. *United States*, 99 F. 2d 305 (C.C.A. 10); *Ryan* v. *United States*, 99 F. 2d 864, 869 (C.C.A. 8), certiorari denied, 306 U. S. 635; *Evans* v. *United States*, 122 F. 2d 461 (C.C.A. 10), certiorari denied, 314 U. S. 698; *Pines* v. *United States*, 123 F. 2d 825 (C.C.A. 8); *United States* v. *Fenwick*, 177 F. 2d 488 (C.A. 7); *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9), pending on certiorari, No. 25, this Term; *United States* v. *Golan*, 24 F. Supp. 523 (E.D. Pa.; Maris, Circ. J.); cf. *Yost* v. *United States*, 157 F. 2d 147 (C.C.A. 4); and see an earlier case *accord*, *Tingle* v. *United States*, 38 F. 2d 573 (C.C.A. 8).

A third possibility, midway between *Daeche* and *Forte*, or at least verbally between them, is the rule that the independent evidence must show that a crime was committed

by someone. This rule is found set forth both in cases that appear to follow *Daeche* as well as in cases that purport to follow *Forte*. See *Anderson* v. *United States*, 124 F. 2d 58 (C.C.A. 6), reversed on other grounds, 318 U. S. 350; *United States* v. *Di Orio*, 150 F. 2d 938 (C.C.A. 3), certiorari denied, 326 U. S. 771; *Vogt* v. *United States*, 156 F. 2d 308 (C.C.A. 5); *Spriggs* v. *United States*, 198 F. 2d 782 (C.A. 9); *Foster* v. *United States*, 212 F. 2d 249 (App. D.C.); cf. *Adolfson* v. *United States*, 159 F. 2d 883 (C.C.A. 9), certiorari denied, 331 U. S. 818. Indeed, the Second Circuit, which as late as 1940 expressly followed *Daeche* and rejected *Forte* (*United States* v. *Warszower*, 113 F. 2d 100, 102, affirmed on other grounds, 312 U. S. 342), now uses a formula consistent with the intermediate rule. See *United States* v. *Markman*, 193 F. 2d 574, 576:

> Whatever may be the rule elsewhere, we have held that the extra-confessional proof required need not itself preponderantly establish the guilt of the defendant; if it shows by independent facts *that the crime has been committed* against which the jury can measure the reliability and consistency of a defendant's own statements, this is enough. [Italics added.]

We say, "verbally between them", because as the *Forte* rule is applied, the requirement that there be independent proof of the *corpus delicti* is no different from a requirement that there be independent proof that a crime has been committed by someone; the *Forte* rule does not require independent proof that the defendant himself committed the crime.[9] The vital distinction between the *Daeche* and

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[9] As restated in *Ercoli* v. *United States*, 131 F. 2d 354, 356-357 (App. D. C.), the *Forte* rule is as follows:

> "* * * (1) there can be no conviction of an accused person in a criminal case upon an uncorroborated extra-judicial confession; (2) such corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence touching and tending to prove each of the main elements or constituent parts of the corpus delicti; (3) however, such corroborating evidence need not, independent of

Forte rules lies in this, that *Forte* insists on extra-confessional proof that a crime has been committed, while *Daeche* is satisfied if that fact is shown by the independent proof plus the confession or admission. On that critical issue, the decisions are not very illuminating; often the facts are such that the test of neither rule is satisfied (e.g., *Tabor* v. *United States*, 152 F. 2d 254 (C.C.A. 4)); and on occasion, as in *United States* v. *Markman*, 193 F. 2d 574 (C.A. 2), *supra*, the court that first originated and then adhered to the *Daeche* rule puts the requirement in terms consistent only with *Forte*. See the quotation, *supra*, p. 21.[10]

In considering the state of the law of evidence administered by the federal courts in criminal cases, it may not be amiss to examine developments in military law, where, by express command of Congress since 1949, the procedure and rules of evidence and of substantive law are prescribed by the President, by regulations, "which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts". Article

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the confession, establish the corpus delicti beyond a reasonable doubt; (4) if there is substantial evidence of the corpus delicti, independent of the confession, and the two, together, are convincing beyond a reasonable doubt of the defendant's guilt, that is sufficient."

See also, to the same effect, *George* v. *United States*, 125 F. 2d 559, 563 (App. D. C.).

[10] A similar intra-circuit inconsistency appears in the Ninth Circuit. Compare *Davena* v. *United States*, 198 F. 2d 230, certiorari denied, 344 U.S. 878, with *Pon Wing Quong* v. *United States*, 111 F. 2d 751, 756, *Spriggs* v. *United States*, 198 F. 2d 782, and *Calderon* v. *United States*, 207 F. 2d 377, pending on certiorari, No. 25. In view of the last two rulings, however, the Ninth Circuit must now be considered as being in the *Forte* column.

In the Fourth Circuit, *Bell* v. *United States*, 185 F. 2d 302, certiorari denied, 340 U.S. 930, leans toward *Daeche* though citing *Forte*; *Yost* v. *United States*, 157 F. 2d 147, leans strongly in the direction of *Forte*; while in *Tabor* v. *United States*, 152 F. 2d 254, the court held that the facts satisfied neither rule and hence did not undertake to resolve the differences between them.

36(a), Uniform Code of Military Justice (50 U.S.C. § 611(a)).[11]

In the 1921 edition of the Army's *Manual for Courts-Martial*, the rule of corroboration was stated in these terms (par. 225(c), pp. 188-189):

> It is not requisite that this outside evidence constituting proof of the corpus delicti shall be sufficient to convince the court beyond a reasonable doubt of the guilt of the accused, nor need it cover every element contained in the charge.

But thirty years later, the *Manual* prescribed for all of the armed forces stated (MCM, US, 1951, ¶140a at p. 251):

> A court may not consider the confession or admission of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone.

The latter rule was accordingly applied by the Court of Military Appeals in *United States* v. *Isenberg*, 2 USCMA 349, 8 CMR 149, after it had noted that the earlier military precedents "embrace the Daeche rule while the later ones seem more consistent with the Forte principles" (2 USCMA at 352, 8 CMR at 152). Since there was no independent proof of *scienter*, the *Isenberg* conviction was reversed.[12]

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[11] Article of War 38, as amended effective February 1, 1949 (10 U. S. C. [Supp. II to 1946 ed.] § 1509) was identical in substance, with only minor verbal variations. So far as the rules of evidence alone are concerned, they have been prescribed by the President since 1916. Article of War 38 of 1916, 39 Stat. 650, 656; Article of War 38 of 1920 (10 U.S.C. [1946 ed.] § 1509).

[12] Inasmuch as the U. S. Court of Military Appeals disposes of some 2000 criminal cases in every calendar year, about 63% of which involve criminal offenses not of a peculiarly military nature, we feel no hesitation in citing its rulings on any point not foreclosed by decisions of this Court.

9. There is no such independent proof in this record. Nor is there in the present record, any independent evidence "of the body or fact of the wrong and the criminal means (not identity) by which it came about" (*George* v. *United States*, 125 F. 2d 559, 563 (App. D. C.); that is to say, there is no independent evidence that there was a payment of money or an agreement to pay money to Hollifield.

Neither is the extra-confessional proof in the instant case sufficient to satisfy the present rule of the Second Circuit, there being no independent evidence "that the crime has been committed", (*United States* v. *Markman*, 193 F. 2d 574, 576), that is to say, that there was a payment of money or an agreement to pay money to Hollifield.

Thus the *corpus delicti* as to petitioner has not been independently established in any degree.

C. This Court should adopt the strict rule, which requires independent proof of the corpus delicti, for the same reason which caused that rule to be first formulated, viz., the danger of improper confessions and admissions.

Since, as has been shown, this Court is not foreclosed by its own rulings on the issue now presented, it is free to adopt whatever rule appears most desirable in the light of the events that have transpired since a divergence first appeared in the circuits.

Just as the shift from *Daeche* to *Forte* reflected the intervening experiences with improperly obtained confessions, so the years since *Forte* have emphasized the soundness of the departure there made, and have shown that the danger that what an accused has said may not be trustworthy is a real one. It is not necessary to look to totalitarian nations for examples of coerced confessions, of forced admissions, or of the psychological torture that is now popularly known as brainwashing. Alas, these manifestations are prevalent in this country also, nor is it necessary to look beyond the otherwise staid pages of the United States Reports. We cite some representative deci-

sions in the margin.[16] The trend in erforcement methods from *Wan* v. *United States*, 266 U. S. 1, and *Bob White* v. *Texas*, 310 U. S. 530, to *Leyra* v. *Denno*, 347 U. S. 556, may reflect a refinement in the technique of obtaining statements from an accused, but assuredly it shows that the basic evil is still very much present. We have learned, too, that confessions are frequently psychologically unreliable, even where no improper pressures are exerted. See McCormick, *Some Problems and Developments in the Admissibility of Confessions* (1946) 24 Tex. L. Rev. 239, 239-241.

There is, accordingly, every reason for this Court to adopt a rule which requires, as a prerequisite to the admissibility of confessions or after-the-fact admissions, the introduction of independent and substantial evidence touching and tending to prove each of the constituent parts of the *corpus delicti*. Otherwise stated, there must be in the record proof tending to show that a crime was committed by some one before any statements made by the defendant after the acts charged against him have been committed become admissible.

With such a rule in effect, the obtaining of confessions and after-the-fact admissions by improper means will be substantially discouraged, and law enforcement officers will of necessity be forced to concentrate on obtaining evidence of criminality independent of any statements made to them by the person they accuse of crime. We submit that the obvious desirability of such a rule far outweighs the risk of an occasional reversal for insufficiency of proof. Certainly the existence of the *Forte* rule has not hamstrung the administration of criminal justice in the District of Columbia. And surely petitioner is not appealing to sentimentality or to libertarianism in contending for the adoption in criminal cases tried in United States district courts

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[16] E.g., *Ward* v. *Texas*, 316 U. S. 547; *Anderson* v. *United States*, 318 U. S. 350; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, 324 U. S. 401; *Lee* v. *Mississippi*, 332 U. S. 742; *Watts* v. *Indiana*, 338 U.S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68.

B. Apart from petitioner's after-the-fact admissions, there is in this record no proof of the corpus delicti and no proof that a crime was committed by anyone.

As before noted, *supra*, p. 17, the *corpus delicti* as to the substantive counts is the payment of money or an agreement to pay money to Hollifield for services rendered or to be rendered by him to the petitioner; and as to the conspiracy count the *corpus delicti* is the agreement.[13]

In this record, there is no evidence independent of Hollifield's statements (which are of course inadmissible against petitioner) or independent of petitioner's after-the-fact admissions that proves the existence of the *corpus delicti* or that shows that an offense was committed by anyone.

1. The court below in summarizing the evidence stated in its opinion (R. 767-768) that petitioner, a sub-contractor on various projects for the equipping of survival kits, submitted to two prime contractors compasses and goggles for the kits; that certain goggles which had been supplied by petitioner to a prime contractor had been recommended for rejection by the Chief, Physiology Branch, Aero Medical Laboratory, on January 23, 1951, because of "marked deviations" from the applicable specifications; that petitioner's co-defendant, Hollifield, was employed by the United States Air Force at Wright Field, Dayton, Ohio, being a designer supervisor (aviation clothing and equipage); that he worked in this position under the Chief, Medical Specifications Branch, with opportunity for "wide use of creative, initiative and independent judgment in placing and supervising the accomplishment of land survival equipment"; that his duty was to review and discuss first samples produced "to determine compliance with specifications"; that as project supervisor of survival kits, it was Hollifield's duty to pass upon the conformity to specifications of the various items in the kit, including

[13] For a case discussing the elements of a *corpus delicti* in income tax evasion cases, see *Potson* v. *United States*, 171 F. 2d 495 (C.A. 7).

goggles; that shortly after the recommended rejection Hollifield secured a conference with Lieut. Moss, a project engineer of the Physiology Branch, and other employees of the Air Force; that petitioner attended this conference and in his presence Hollifield argued that the goggles be accepted; that at the conference it was concluded that Hollifield should embody his reasons for recommending acceptance in a routing and record sheet and this was done; that the routing and record sheet stated: "Confirming conversation between Messrs. F. Moss and O. Strand of your Branch and Messrs. R. Hollifield and N. Murray of Medical Specialties Branch, it would be appreciated if your office would reconsider the use of the goggles submitted to determine their conformity with subject item, in view of the following information"; that while the routing and record sheet was signed by Randall W. Briggs, it bore the initials of Hollifield and, in asking for reconsideration, stated substantially the reasons Hollifield had advanced at the oral conference above described as to why the rejection of the goggles should be changed; that reconsideration was granted and the use of the substitute goggles submitted by appellant was recommended on February 3, 1951.

Petitioner acknowledges that the evidence summarized immediately above was adduced from sources independent of petitioner's admissions. But petitioner submits that none of such evidence establishes or could give rise to a reasonable inference that anyone, petitioner included, paid or agreed to pay money to Hollifield—and, as stated, it is the payment or agreement to pay that constitutes the *corpus delicti* in this case.

2. The court below, in its summary of the evidence (R. 767) further stated that petitioner "had been acquainted with Hollifield for several months, having met him in October, 1950, and having seen him some 15 times during the period involved."

In fact, however, there is no independent evidence that petitioner saw Hollifield some fifteen times during the period involved. The sole source of this statement is the testimony of Special Agent Regan, of the F.B.I., who testified (R. 322) that petitioner orally admitted to him that he met Hollifield on approximately fifteen occasions. The only independent evidence in this record is that, on a single occasion (January 23 or 24, 1951), petitioner attended a meeting at Wright Field, at which meeting there were present Hollifield, Norris N. Murray, O. T. Strand, and F. Moss (the latter three being officers at Wright Field) and a sixth man whose identity was not disclosed (R. 377-378).

3. The court below in its summary of the evidence (R. 767), referring to the rejection of certain goggles supplied by petitioner, recited further: "Hollifield as admitted by appellant, had discussed this matter with appellant." There is in the record of the case no independent evidence of any such discussion.

4. In addition to the evidence thus summarized by the court below, there were but three items of independent evidence, which might be said to relate remotely, if at all, to the payment of money, *viz.*,

a. That on April 14, 1951, Hollifield went to the City of Chicago (R. 334, 420-423);

b. That on April 13, 1951, a telephone call was made from the Hollifield residence in Dayton, Ohio, to the Opper residence in Chicago (R. 414-415, 417); and

c. That a check for $1000.00 was drawn by Opper on April 13, 1951, and was cashed by Opper on April 16, 1951 (R. 333-336, 425-427; Govt. Ex. 42, R. 333, RE 103).

But, (a) there is no independent evidence that Hollifield met or communicated with Opper while in Chicago;

(b) There is no independent evidence as to who, if anyone, conversed, or whether the conversation related to business or social matters; and,

(c) There is nothing on that check and no independent evidence to identify it with Hollifield; and, moreover, Opper's bank ledger sheets (Govt. Ex. 43, R. 337, RE 104-106) demonstrate that within two and one-half months of April 16, 1951, Opper cashed fifteen other checks amounting to or exceeding $1000.00.[14]

It is significant in this connection that the Government in its recital of the independent evidence (Br. Op. 15) states that the items selected "all tend in general to corroborate petitioner's admissions of payment."[15] Those items would satisfy the *Daeche* rule, but when the Government goes on to suggest "that the independent facts detailed above suggest the existence of a corrupt agreement between petitioner and Hollifield and the transfer of money sufficiently to satisfy the rule adopted in *Forte* v. *United States* * * *, since it is established that the independent proof of the *corpus delicti* need not in itself be sufficient to establish the crime" (Br. Op. 15-16), it badly misreads *Forte* and the cases interpreting that decision. Of course there is no need to prove independently of the confession the agency of the accused as a criminal, but there must be, apart from what the accused said, "substantial evidence touching and tending to prove each of the main elements or constituent parts of the corpus delicti". *Ercoli* v. *United States*, 131 F. 2d 354, 356-357, quoted above, pp. 21-22, note

[14] The reference at R. 523, where petitioner's trial counsel is made to say, "a check for a thousand dollars *with* Hollifield's name on it", is an obvious typographical error; the word "with" should be "without". This is apparent from an inspection of the check itself, duly reproduced in facsimile in the record (Govt. Ex. 42, RE 103); it does not bear Hollifield's name.

[15] The Government speaks of "independent evidence of meetings between Hollifield and petitioner" (Br. Op. 15). This is error, for, as demonstrated above, pp. 25-26, there is independent evidence of only a single meeting between the two.

of a rule now adhered to before courts-martial, and in urging the rejection by this Court of a rule that has been advisedly abandoned by military tribunals.

Indeed, the adoption of the rule now contended for will not only strike a telling blow at improper and unlawful practices in the securing of confessions and of admissions after-the-fact, it will sensibly lessen an evil that has long concerned judges of this and other courts—the dangers inherent in prosecutions for conspiracy. To those we turn.

III. THIS CASE PRESENTS A GRAPHIC EXAMPLE OF THE ACTUAL IMPOSSIBILITY, IN CONSPIRACY PROSECUTIONS, OF LIMITING THE ADMISSIBILITY OF STATEMENTS MADE BY A CO-DEFENDANT.

Opinions in this Court, particularly in recent years, have several times reflected an awareness of the dangers implicit in prosecutions for conspiracy. See *Gebardi* v. *United States*, 287 U. S. 112, 122; *Kotteakos* v. *United States*, 328 U. S. 750, 776-777; *Von Moltke* v. *Gillies*, 332 U. S. 708, 721-722, 727-729; *Krulewitch* v. *United States*, 336 U. S. 440, 445-458; *Nye & Nissen* v. *United States*, 336 U. S. 613, 625-626.

We cannot add to the wealth of learning or to the sharpness of analysis therein set forth, nor do we propose to repeat parrot-like what members of this Court have already said on that subject. If the ornithological simile may with propriety be further pursued, we prefer, after the manner of the magpie, to appropriate what the labor of others has there conveniently assembled. Solely by way of emphasis, it may be desirable to quote from one of the authorities already cited (336 U. S. at 454, n. 21), an article by the then Chief of the Criminal Division of the United States Attorney's Office for the Eastern District of New York, O'Dougherty, *Prosecution and Defense under Conspiracy Indictments* (1940) 9 Brooklyn L. Rev. 263:

> The rules of evidence applicable to these cases offer the most cogent reason for the modern prosecutor to

> seek this particular count in his indictment. Where proof would normally be rejected under a substantive count, the more encompassing privileges under the conspiracy count permit its introduction where, otherwise, it could not be introduced. (p. 271.)
>
> Great latitude is therefore allowed in the admission of circumstantial evidence. (p. 273.)
>
> Persistent efforts are made by the modern prosecutor to secure the testimony of one conspirator, or aider, or abettor, as against the remaining defendants. (p. 273.)[17]

The fears voiced in the opinions of this Court just cited are shown by this record to have been well founded, and the accuracy of the observations made in the paper just quoted are dramatically demonstrated.

The trial judge repeatedly admonished the jury that the statements of the co-defendant Hollifield could not be used against petitioner (R. 260-261, 268-269, 290, 444, 722). Yet the jury was still so far confused as to find petitioner guilty on Counts 2 and 3 (R. 20), although, as the court below held (R. 772), the only evidence connecting petitioner with the payments alleged in those counts was the statement of Hollifield. And "the distinguished and experienced trial judge who heard the case" (R. 769) was himself also so confused that, despite the absence of competent evidence against petitioner on those counts, he denied a motion for judgment of acquittal thereon (R. 18, 19), overruled a motion for new trial (R. 27), and imposed sentence in respect of each of the invalid counts (R. 29).

Although the court below set aside the conviction on Counts 2 and 3 (R. 765, 772), it did rely, as we have already pointed out, *supra*, pp. 25-27, on matters which were not independently proved dehors the petitioner's admissions. And, significantly, as to both there was ample additional

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[17] The word "modern" in this context reminds ominously of what at the time of writing was in some circles considered the wave of the future.

evidence in Hollifield's statements to the F.B.I. and to the grand jury (numerous meetings with petitioner, R. 299-316 *passim*, and R. 322; discussion of specifications for goggles, R. 262-301; Govt. Ex. 37, R. 266, RE 97-98; Govt. Ex. 38, R. 290, RE 99-100). Assuredly, as we have shown (*supra*, pp. 24-28), petitioner's conviction on Counts 1, 4 and 5 has been affirmed without competent independent proof of the *corpus delicti*. And the statements of Hollifield, inadmissible against petitioner as a matter of law, may yet in point of fact have significantly contributed to that result.

It is commonplace in psychology that the ability of the human mind to compartmentalize and insulate particular bits of knowledge is limited. But where that inability has dire consequences to the liberty of an individual, where the mind's incapacity to apply fact A only to defendant X actually makes that inadmissible evidence seal the doom of defendant Y—or at least make a material contribution to that end—we pass from the realm of psychology to that of law.

At this juncture, what Mr. Justice Cardozo said for the Court in *Shepard* v. *United States*, 290 U. S. 96, 104, with reference to the use there made of the declaration of a deceased person not qualifying under the dying declaration exception, becomes relevant:

> It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

And because the admissible aspect of the declaration there involved "was a filament too fine to be disentangled by a jury" (290 U. S. at 106), the judgment was reversed.

Similarly, the present case is a virtual laboratory example of the operations of the rules of evidence in a conspiracy case, illustrating and illuminating the soundness of the strictures in the opinions cited *supra*, p. 30. We may agree with the Government (Br. Op. 16) that "the fact that error may occasionally occur in the operation of a rule does not mean that the rule is wrong." But in conspiracy cases, the errors occur constantly, and recur persistently; for reasons already canvassed, it could not be otherwise.

We do not ask, we could not properly ask, this Court by judicial fiat to declare a new rule of law in conspiracy cases that will limit such prosecutions beyond any point as yet fixed by Congress. But we do and can ask that this Court minimize the danger inevitable in conspiracy cases, the risk that particular defendants will be prejudiced in fact by declarations of co-defendants which are inadmissible against them in point of law. And we submit that the proper and appropriate path to the attainment of that admittedly desirable goal is the adoption of the rule contended for by this petitioner, *viz.*, that admissions must be corroborated by proof of the *corpus delicti* which shall be at least sufficient to show that a crime has been committed by someone, and which is independent of statements by any defendant.

With such a rule in effect, there would be far less danger that a jury could unconsciously be influenced by inadmissible statements of co-defendants, since the jurors would then be instructed that they could not consider any confession or admission until they had first found, from evidence independent of statements by the particular defendant or by any co-defendant, that the crime charged had actually been committed by some person. Thus the emphasis would be on trustworthy independent evidence, admissible against

all, rather than, as at present, on statements by the very persons accused, which are admissible only against the declarant.

Petitioner is here contending for the adoption of the rule that a confession or an admission after-the-fact is inadmissible unless it is corroborated by proof, independent of what the accused said, of the *corpus delicti*, of the commission of a crime by someone.

This rule owes its modern origin to the prevalence of improperly obtained confessions. It now has the support of most of the circuits that have passed on the issue, and is moreover applied in all courts-martial, the military having abandoned the earlier and less stringent requirement for corroboration.

Adoption of the strict standard of corroboration is certain to have two beneficial effects. First, by the emphasis placed on proof independent of what the defendant said that a crime has been committed by someone, improperly obtained confessions will necessarily be discouraged. If they are inadmissible, the incentive to procure them is necessarily lessened. Second, the same emphasis on independent evidence, which will be admissible against all defendants in conspiracy prosecutions, will materially minimize the danger now inherent in such prosecutions, that statements of co-defendants will be admitted in fact to the detriment of those against whom they are inadmissible in law.

Rarely if ever in the administration of criminal justice has there been presented to this Court a similarly fruitful opportunity for prophylactic adjudication.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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APPENDIX

STATUTES INVOLVED

Title 18, United States Code

§2. Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

* * * * *

§281. Compensation to Members of Congress, officers and others in matters affecting the Government

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress.

* * * * *

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

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No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1953

WILLIAM J. OTTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT STATED IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 719

WILLIAM J. OPPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 766-772) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1954 (R. 765). The petition for a writ of certiorari was filed on April 24, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the verdict as to petitioner was rendered defective by the fact that a juror expressed some hesitancy as to his verdict when first polled as to a codefendant but on being pressed for an affirmative answer agreed that the verdict was his.

2. Whether such juror may impeach his verdict by affidavit setting forth his motivation in voting for a verdict of guilty.

3. Whether admissions made in a voluntary statement denying guilt, which statements are corroborated by other circumstances, may be considered in proof of the *corpus delicti*.

4. Whether the trial court's admission in evidence of a codefendant's confession constituted reversible error where the court instructed the jury meticulously both at the time of admission and in its final charge that the confession was admissible only against the codefendant.

STATUTE INVOLVED

18 U.S.C. 281 provides in pertinent part:

> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department of agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which

the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

* * * * *

STATEMENT

The first four counts of a five-count indictment returned in the United States District Court for the Southern District of Ohio charged federal employee Robert C. Hollifield, Sr., as principal, and petitioner William J. Opper, as an aider and abettor, with receiving and agreeing to receive compensation for services rendered in connection with purchase requests and contracts pending before the Department of the Air Force of the United States, in violation of 18 U.S.C. 281 (R. 1-6). Count one charged an agreement by Hollifield on or about October 1, 1950 to receive $1,750 (R. 1-2); count two, a receipt by Hollifield from petitioner of $50 on or about March 1, 1951, in Dayton, Ohio (R. 2-3); count three, a similar receipt of $250 on or about March 1, 1951 (R. 3-5); count four, a similar receipt of $200 on or about August 5, 1951 (R. 5-6). Count five charged a conspiracy between Hollifield and petitioner from October 1, 1950, until about September 26, 1951, to violate 18 U.S.C. 281 (R. 6-10).

The evidence may be summarized as follows:

During the period covered by the indictment,

Hollifield was Chief of the Land Survival Unit at Aero Medical Laboratory, at the Wright Air Development Center in Dayton, Ohio. As designer supervisor of aviation clothing and land survival equipment, he prepared the specifications for survival kits. (Gov. Exs. 14 and 15, RE 49-51;[1] R. 88-89.) Petitioner, who was engaged in the toy, novelty and war surplus business in Chicago, Illinois, supplied prime contractors, including S. Buchsbaum & Company of Chicago, with goggles which were used in the survival kits purchased by the Air Force (R. 137-138, 143, 161, 162, 601).

On January 8, 1951, S. Buchsbaum & Company submitted samples of petitioner's goggles to the Air Force at Dayton requesting permission to use them in the survival kits under its contracts with the Government (Gov. Exs. 22 and 23, RE 73-75; R. 138-140, 163). After testing the goggles, the Aero Medical Laboratory on January 23, 1951, recommended rejection of the goggles because of "marked deviations" from specifications (Gov. Ex. 27, RE 80; R. 374-377). Hollifield called the officer in charge of the testing (R. 377) and arranged a conference which he, together with petitioner and some members of the Aero Medical Laboratory personnel, attended (R. 378-379). At this conference, Hollifield urged that the goggles be accepted and was advised to prepare a memorandum setting forth his reasons therefor (R. 378). He prepared and

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[1] The designation "RE" refers to volume III of the record which contains the exhibits. The pagination of this volume does not follow consecutively that of volumes I and II.

initialed such a memorandum in which he requested the reconsideration of the use of the goggles, "although not in accordance with the current specification," on the grounds that these goggles were immediately available and were $2.55 less than those conforming to the specifications which would have to be specially manufactured for this purpose (Gov. Ex. 28-a, RE 81; R. 379-380). On the basis of this memorandum, petitioner's goggles were approved on February 3, 1951 (Gov. Ex. 28-b, RE 82; R. 380-382), and S. Buchsbaum & Company was informed that the goggles could be used in survival kits which it was preparing for the Air Force (Gov. Ex. 24, RE 76).

Thereafter, on April 13, 1951, from his residence Hollifield telephoned petitioner at his residence in Chicago (Gov. Ex. 46, RE 109; R. 415-416) and the next day Hollifield flew to Chicago (Gov. Ex. 49, RE 112; R. 420-421). On April 13, petitioner drew a check for $1,000 which he cashed on April 16, 1951 (R. 425-427).

Petitioner was questioned by the F. B. I. on October 10, 1951 (R. 320-321). He was told that anything he said might be used against him (R. 319). When asked whether he had given money to Hollifield for any purpose, he stated that he wished to consult an attorney before discussing the subject any further (R. 321). On October 12, 1951, he orally admitted that he had given Hollifield $1,200, first $1,000 in currency and then $200. He said that Hollifield, with whom he had become

friendly, had said that he was about to lose his home, and that the money had been given as a loan although petitioner did not of his own knowledge know that Hollifield had a home. (R. 323-324.) Petitioner did not have any receipt or record to evidence the loan (R. 323). On October 16, petitioner gave the F.B.I. a signed statement setting forth the facts orally admitted on October 12 (R. 325-326, Gov. Ex. 41, RE 101-102).[2]

---

[2] Petitioner's written statement reads in full as follows (Gov. Ex. 41, RE 101-102):

"I have been asked to submit a statement relating to my so-called dealings with Robert Holafield [sic].

"In the winter of 1950, as best I can recall, I was at Dayton, Ohio then visiting with the firm of Cappel & MacDonald & Company with whom I had numerous business transactions. At the office of this firm I met Mr. Holafield and in a discussion about things made for the armed forces, Mr. Holafield then stated that the next time I was in Dayton to visit him at Wright Field. Sometime later I went to Wright Field and saw Mr. Holafield and had a social visit with him. We discussed no particular matters of any kind. Sometime later when I visited Mr. Holafield at Wright Field I discussed with him the possibility of making a wrist compass that was being required by the armed forces as well as using my ¾ inch compass in any future kit. While there I saw photographs of numerous items being used and some of the items seen by me I recognized as items that I furnished to prime-contractors.

"Sometime in the spring of 1951 I learned about an objection to a goggle and decided while in Dayton, Ohio visiting Cappel & MacDonald & Company to discuss the matter with Mr. Holafield. At that time Mr. Holafield stated that he did not know what objection was being made and that if I care to know specifically what that objection was to talk with someone in the optical department. Mr. Holafield and myself then went to the optical department and I tried to learn what specific objection was being made and was informed that there was some slight difference in the lense specification.

"I wish to be understood that at no time had I requested Mr. Holafield to do anything on my behalf. I was making no sale to the government as my sales were at all times confined to prime-contractors, who I understand obtain approvals.

The trial court also admitted in evidence sworn statements which Hollifield made voluntarily after being fully advised as to his rights (Gov. Exs. 36, 37 and 38, RE 96-100; R. 256-259) and his testimony before the grand jury which returned the instant indictment (R. 296, 299-316).[3] This evidence showed that in January, 1951, Hollifield accepted petitioner's offer to pay him $1,750 if he would secure approval of petitioner's goggles for the survival kits and that petitioner paid Hollifield in cash $50 in February or March, 1951; $200 in April, 1951; $1,000 about April, 1951; $200 in August, 1951; and $100, date unknown (Gov. Exs.

"Sometime in the early part of 1951 Mr. Holafield had been in Chicago and our respective families visited socially. Sometime in April, as best I can recall, Mr. Holafield communicated with me and indicated that he was hard pressed financially and although I felt no moral or legal obligation to Mr. Holafield in any manner I indicated to him that if I could help him I would try to do so. When he visited Chicago he called upon me and stated that the reason for his financial distress was that he had to meet a mortgage on his home of approximately $1,200.00. Being mindful of the fact that I could help him financially and being charitable I gave Mr. Holafield $1,000.00 which he promised to repay when he was financially able to do so and a few weeks later gave him $200.00. I realize now the foolishness of my act but had no motive in so doing except in making him a loan."

Although it is not clear from the record whether he consulted an attorney before October 16, on October 29, 1951, in response to further F.B.I. requests for written statements, petitioner declined by saying that his attorney did not feel it was necessary (R. 349-350).

[3] Immediately preceding the introduction of this evidence (R. 319-320, 331) and again in its final charge to the jury (R. 721-722), the court emphatically and repeatedly instructed the jury that petitioner's conversations with and statement to the F.B.I. were to be considered only in connection with petitioner's guilt and not Hollifield's.

37 and 38, RE 97-100; R. 303, 304, 305, 306, 308-309, 313, 314-315).[4]

The court admitted such evidence *in toto* over petitioner's objection that his name be deleted in all such evidence (R. 246), but at the same time the court admonished and instructed the jury that it was admitted against Hollifield only (R. 260-267, 268-269, 290). The final instructions of the court in respect of this evidence were as follows (R. 721-722):

> In this connection, however, I desire to call your attention to the following: There has been introduced in evidence through various witnesses, statements that were made on various occasions; some by the defendant Hollifield and some by the defendant Opper. There is in evidence the oral testimony of certain wi[illegible]s as to what these statements were. In addition to this oral testimony there are now in evidence three documents marked Government's Exhibits 37, 38 and 41.
>
> Exhibits 37 and 38 are written statements, signed by the defendant Hollifield. Exhibit 41 is a written statement signed by the defendant Opper.
>
> I have heretofore instructed you during the progress of the trial, as forcibly as I know how, but I repeat here that anything that de-

---

[4] The grant jury testimony indicated that Hollifield received a total of $1,550 (R. 315) while his statements to the F.B.I. and O.S.I. show that he received only $1,200 (Gov. Exs. 37 and 38, RE 97-100).

> fendant Hollifield may have said or written about himself in connection with the transactions here under consideration in the various counts of the indictment, you may consider as evidence against the defendant Hollifield, but you must not consider such statements as evidence against the defendant Opper.

Petitioner was found guilty on all counts. He was sentenced to consecutive terms of imprisonment of two years on count 1 and one year on count 4; to fines of $500 each on counts 2 and 3; and to a term of imprisonment of one year and one day on count five, this sentence to run concurrently with the sentences imposed on counts 1 and 4. (R. 20, 29.)

On appeal, the Court of Appeals affirmed the judgment of conviction on counts 1, 4 and 5 and reversed on counts 2 and 3 on the ground that there was no competent evidence against petitioner to establish the specific payments charged in the reversed counts (R. 765, 772).

ARGUMENT

1. After the written verdicts of guilty were read by the Clerk, defense counsel requested a poll (R. 740). The court thereupon read the verdicts and asked the jury as a body as to petitioner and co-defendant separately "Is this your verdict." In each case the jury as a body replied affirmatively.

When the jury was polled individually as to Hollifield, each of the jurors but Marker replied promptly that the verdict was his (R. 741, 743).

As to juror Marker, the following occurred (R. 741-743):

The CLERK: Raymond Marker, is this your verdict as to Robert G. Hollifield?

Mr. MARKER: I signed the paper.

The COURT: No. That is not the answer. Is that your verdict? Say yes or no.

Mr. MARKER: I guess it is.

The COURT: That is not the answer. The question is, is that your verdict. You may say yes or no.

Mr. KELLEY [Defense counsel]: If your Honor please, the defense moves that this jury be sent back for further deliberation, sir.

The COURT: You may answer the question, Mr. Marker, whether that is your verdict, yes or no.

Mr. MARKER: Yes, I guess.

The COURT: Mr. Marker, will you answer the question? Please state whether or not that is your verdict as to Robert Hollifield. Answer it yes or no.

Mr. MARKER: (Hesitates) Can't I say "I guess"?

The COURT: No, Mr. Marker, you can't say "I guess". You will have to say—you are being polled now and the question is whether or not this is your verdict. You must say, "Yes, it is" or "No, it is not", whichever you see fit to say. It must be one or the other. You can't guess at it.

Mr. KELLEY: In justice name——

The COURT: Pardon me, Mr. Kelley. I am running this Court. Please be seated. You

answer the question yes or no, Mr. Marker, as you see fit. That is up to you.

Mr. MARKER: Yes.

The COURT: All right. Go to the next juror.

Mr. KELLEY: May the record show the time that has taken place before this Gentleman expressed himself?

The COURT: The record may show anything you please.

Mr. KELLEY: May the record show many minutes passed?

The COURT: I wanted to know from Mr. Marker whether this was his verdict and he said: "Yes, it is."

Mr. KELLEY: May the record show before he responded many minutes passed and may it show that the juror has bent his head in great perturbation? May the record show that the juror is now in tears?

When subsequently polled individually as to petitioner, the jury unanimously and promptly replied affirmatively (R. 743-745) with Marker saying (R. 743): "I said it once. Yes, yes it is."

There can be no doubt on this record, that Marker had actually reached the verdict of guilty. As we discuss below, that fact is not negatived even by the affidavits subsequently submitted by Marker. The judge made it perfectly clear that he merely wished the juror to take a stand as to whether the verdict was or was not his. The court's insistence on an affirmative answer was not coercion to acquiesce in any particular verdict; it was merely to determine whether the jury had in

fact reached a unanimous verdict. As such it was not only proper, but necessary. Thus the facts of this case are very different from the cases on which petitioner relies (Pet. 13-17) in none of which was it clear that, at the time the jury was polled, the juror did state that the verdict was his. Manifestly, if there was agreement, as there clearly was in this case, there was no reason to send the jury back to reach an agreement. It should be noted particularly that when juror Marker was polled on the verdict with respect to petitioner, he made only the flat statement that he joined in that verdict. Moreover, this was a matter clearly within the discretion of the trial judge who had the advantage of observing the juror in concluding that he genuinely joined in the verdict.

2. In connection with his motion for a new trial, petitioner submitted an affidavit by Marker and a supplement thereto (R. 21-25, 749-750) in which Marker alleged that the verdict of guilty against petitioner was not his in that: (1) in the jury room just prior to returning to the courtroom he changed his original acquittal verdict to that of guilty because other jurors indicated that he might be motivated by corrupt reasons in voting for acquittal and (2) while being polled, he wanted to say that the guilty verdict was not his "conscientious" verdict, but he was afraid that the court would either censor him or hold him in contempt (R. 24-26). The court denied the motion and ordered the affidavits stricken from the record (R. 756) on the ground, *inter alia*, that (R. 755):

> It has been held many, many times—so often that it is not worthy of the citation of authority, that the verdict of a jury cannot be later set aside because of some subsequent comment or affidavit of a juror as to what took place, either in the jury room or elsewhere.

We submit that the trial court was correct. Significantly, these allegations themselves do not tend to show that Marker did not knowingly and conscientiously vote for a guilty verdict. The rule is clear, not only that a juror cannot impeach a verdict which, like the one here, was unmistaken and unambiguous, but that under no condition is impeachment allowed to show a juror's motivation in joining in the verdict, as petitioner attempts to do.[5] *McDonald* v. *Pless*, 238 U. S. 264, 267-269; *Mattox* v. *United States*, 146 U. S. 140; *Freid* v. *McGrath*, 135 F. 2d 833 (C. A. D. C.); 8 Wigmore on *Evidence*, 3rd ed., Sections 2348 and 2349.

3. Petitioner contends (Pet. 17-20) that his statements to the F. B. I., *supra*, pp. 5-7, were inadmissible on the ground that they did not meet the minimum requirements of the least stringent rule requiring corroboration of confessions by independent proof of the *corpus delicti*. Underlying that contention is the assumption, which the court below rejected (R. 771), that the statements were confessions. The court held that such statements,

[5] Furthermore, the accuracy of Marker's allegation that he was afraid to speak out when being polled because of possible censor by the court is doubtful in view of the complete ease with which he twice successfully requested the court to adjust the trial schedule to his convenience (R. 497-498, 730-731).

being denials rather than acknowledgments of guilt, were "not confessions" and hence "Decisions upon the admissibility of confessions have no bearing upon the admissibility of appellant's statements" (R. 771). We submit that an examination of the underlying principles of the corroboration-confession rule and the authorities clearly support the holding below.

The fundamental purpose of the rule requiring corroboration of confession is to guard against convictions based upon untrue confessions alone. *Warszower* v. *United States*, 312 U. S. 342, 347; *United States* v. *Markham*, 193 F. 2d 574, 576 (C. A. 2). Judicial experience has shown that confessions may be untrustworthy because of the possibility that promises or threats have induced the accused to declare his guilt. 3 Wigmore on *Evidence* (3rd ed.) Section 822; *Forte* v. *United States*, 94 F. 2d 236, 238-239 (C. A. D. C.). But where, as here, the statement is a denial of guilt, the accused obviously was not acting under such pressures. Hence, such a statement is not subject to the same unreliability as a confession and for that reason does not require corroboration. See *Warszower* v. *United States, supra*, at p. 347, where this Court rejected the application of the corroboration rule to admissions made prior to the commission of the crime because such statements contained "none of the inherent weaknesses of confessions." This statement also contains no such inherent weaknesses.

The distinction between inculpatory and excul-

patory statements has generally been recognized by the courts, even by those which follow the strict confession-corroboration theory. *Morton* v. *United States*, 147 F. 2d 28, 31-32 (C. A. D. C.), certiorari denied, 324 U. S. 875; *Ercoli* v. *United States*, 131 F. 2d 354, 356 (C. A. D. C.); *Dimmick* v. *United States*, 116 Fed. 825 (C. A. 9); Wigmore, *ibid.*, Sec. 821; see also *Perovich* v. *United States*, 205 U. S. 86, 91; *Wilson* v. *United States*, 162 U. S. 613, 621-622; *Ballew* v. *United States*, 160 U. S. 187, 193; cf. *Bram* v. *United States*, 168 U. S. 532, 541-543.

It should be noted that we are dealing here only with that aspect of the rule of corroboration which relates to corroboration by independent evidence of the *corpus delicti*. There can be no doubt that the independent evidence of meetings between Hollifield and petitioner, the benefit which Hollifield secured for petitioner, the telephone call from the Hollifield residence to the Opper residence, and the $1,000 check drawn by petitioner on April 13 and cashed on April 16, 1951, all tend in general to corroborate petitioner's admissions of payment. There is thus in this case no issue as to whether a person can be convicted on his own statements without independent proof of any kind. The question is merely whether the independent proof sufficiently tends to show the elements of the specific crimes charged. We believe that the independent facts detailed above suggest the existence of a corrupt agreement between petitioner and Hollifield and the transfer of money sufficiently to satisfy the rule adopted in *Forte* v. *United States*, 94 F. 2d 236

(C. A. D. C.) and other cases cited by petitioner, since it is established that the independent proof of the *corpus delicti* need not in itself be sufficient to establish the crime. See cases cited in the *Forte* opinion, pp. 240-243. But we do not need to resolve that factual issue here. We think it is clear that exculpatory statements, made under the circumstances here proved, do not come within the reason of the rule requiring independent corroborative evidence of the *corpus delicti*, and, therefore, that affirmance of the conviction was clearly correct.

4. Although acknowledging that the codefendant's statements were admitted under the safeguarding instructions which the courts have held sufficient, petitioner argues (Pet. 20-21) that the results in this case show that the safeguards were insufficient since, as the court below found, the only evidence connecting petitioner with the specific payments charged in counts 2 and 3 were the statements of Hollifield. But the fact that error may occasionally occur in the operation of a rule does not mean that the rule is wrong. This is obviously a case in which it was proper to try the two defendants together, and, manifestly, it was proper to admit against each statements which he had voluntarily made. The judge carefully instructed the jury as to the limited use of the codefendant's testimony, and the error that may have resulted from failure to follow that instruction has been cured by the Court of Appeals. There is thus no question warranting review.

Petitioner's further statement that the Court of

Appeals compounded the error is unwarranted. The affirmance by the court below does not show any inabiiity on the part of the court below to properly limit the Hollifield confession. As already shown above, independent proof of the *corpus delicti* was not necessary in this case and the court below affirmed the convictions only after so holding. Its reversal on counts 2 and 3 clearly demonstrated its complete comprehension of the limitation on the use of Hollifield's statements.

CONCLUSION

The case involves only the application of settled principles and presents no questions requiring further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1954

WILLIAM J. OPPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 766-772) is reported at 211 F. 2d 719.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1954 (R. 765). The petition for a writ of certiorari was filed on April 24, 1954, and granted on June 7, 1954 (R. 775). The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also former Rule 37(b)(2) and Rule 45(a), F. R. Crim. P.

STATUTES INVOLVED

18 U.S.C. 281:

> Whoever, being * * * [an] officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensaiton for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U.S.C. 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such con-

spiracy shall not exceed the maximum punishment provided for such misdemeanor.

QUESTIONS PRESENTED

1. Whether petitioner's statement, denying guilt but embodying some evidence tending to prove a part of the offense, voluntarily made to investigating officers after the offense, must be excluded unless corroborated.

2. Whether, assuming that corroboration was necessary, petitioner's statements were sufficiently corroborated by other evidence.

3. Whether the jury in convicting petitioner, and the court below in sustaining his conviction, relied upon statements of his codefendant which, as a matter of law, were not competent evidence against him.[1]

STATEMENT

In the first count of a five-count indictment returned in the United States District Court for the Southern District of Ohio, Robert George

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[1] The Court, in granting certiorari (347 U.S. 1010), referred to the questions to be argued, in the language of the petition, i.e.:

> "Whether, where an admission is made to law enforcement officers after the date of the acts charged as crimes, it is to be so far treated as a confession that, in the absence of corroboration, it is inadmissible.
>
> "Whether a conviction can be sustained where there is, apart from an admission made to law enforcement officers after the date of the acts charged as crimes, no proof of the *corpus delicti*.
>
> "Whether, in convicting petitioner the jury, and in sustaining his conviction the court below, in fact admitted, as against him, statements of his co-defendant which, as a matter of law, were not competent evidence against him."

Hollifield, Sr., a federal employee, was charged, as principal, with agreeing, on or about October 1, 1950, to receive compensation of $1,750 from petitioner, William J. Opper, charged as aider and abettor, for services to be rendered by Hollifield in relation to certain purchase requests and contracts pending before the Department of the Air Force of the United States, the services to consist in Hollifield's recommending the approval and procurement by the Air Force of certain types of sun goggles and ski goggles (R. 1-2).

In counts two, three, and four, Hollifield, as principal, and petitioner, as aider and abettor, were charged with payments by petitioner to Hollifield in amounts of $50 and $250 on or about March 1, 1951, and $200 on or about August 5, 1951, for the above services (R. 2-6).

Count five charged a conspiracy between Hollifield and petitioner, from about October 1, 1950 to September 26, 1951, to cause Hollifield to receive compensation from petitioner for the services described in the first four counts, and to defraud the United States of and concerning its right to Hollifield's lawful functioning as an employee (R. 6-7, specifying 13 overt acts at R. 7-9).

At the trial, evidence was adduced by direct testimony of witnesses and introduction of documents and letters, and the government also presented evidence of full oral and written confessions

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[2] These counts specified three purchase requests and two contracts in addition to those specified in count one.

by Hollifield, and oral and written statements of petitioner that he had handed Hollifield sums in the aggregate amount of $1,200 as loans. Hollifield and petitioner did not take the stand.

The evidence covering the main features of the events during the period of the conspiracy, independent of the statements of Hollifield and petitioner, may be summarized as follows:

During the period covered by the indictment, Hollifield was Chief of the Land Survival Unit at the Aero Medical Laboratory, Wright Air Development Center (Wright Field), Dayton, Ohio. As designer supervisor of land survival equipment, he prepared specifications for survival kits, with opportunity for wide use of independent judgment in planning and supervising the accomplishment of land survival equipment (R. 88-89, RE 49-51).[3]

Petitioner was engaged in the toy, novelty, and war surplus business in Chicago, Illinois, and possessed equipment for manufacture of compasses (R. 161-162, 601).

Late in September, 1950, Chester Buchsbaum, of Chicago, Illinois, desiring to bid on a government purchase of the E-1 type of sustenance kit, interviewed Hollifield at Wright Field and, upon inquiring where some of the components of the kit could be bought, was referred by Hollifield to petitioner

[3] The designation "RE" refers to volume III of the record which contains the exhibits. The pagination of this volume does not follow consecutively that of volumes I and II.

for the compass item. Buchsbaum asked for petitioner's address and Hollifield replied, "I don't know anything about it except his name is Opper and he is in Chicago" (R. 129-130, 154-155).

In the early part of October, 1950, Holton, an employee at Wright Field, saw petitioner present in the quarters of the Land Survival Unit at Wright Field, and talked with him. In cross-examination, Holton testified that he was "fairly certain" that this occurred "within the first week or ten days of October" (R. 354, 364).[4] Holton saw petitioner three or four times subsequently (R. 354).

Adam D. Cappel, of Dayton, Ohio, also preparing to bid on the E-1 kit for Cappel-MacDonald Company, was given the name of petitioner by Hollifield, as a source for the compass component, Hollifield stating that he had only heard of petitioner and did not know his address in Chicago. Cappel, testifying for the defense, estimated the date of the conversation as "possibly the 10th or 9th of October", and stated that his associate Wayman

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[4] Further cross-examination on the point was as follows (R. 364-365):

> Q. If it were to be suggested to you that Mr. Opper was never at that Field until after the E-1 contract bids had been filed on the 13th of October, would it still be your testimony that you had met him about the 10th, or at a later time?
>
> A. I couldn't be certain.
>
> Q. In other words, you are not certain as to those dates, when you saw him. It could have been after the 13th of October. Correct?
>
> A. Possibly.

then located petitioner in Chicago by phone and arranged for bids (R. 605-606).

Prior to the submission of bids on the E-1 kits, both Buchsbaum and Cappel-MacDonald were informed by petitioner of his ability to supply goggles for the kits (R. 130-131, 606).[5] Cappel sent one Kline with samples of various components, including the goggles, to Hollifield on October 12. Cappel testified that Kline telephoned him the goggles were rejected for lack of a spare set of lenses (R. 607-608), and Norman K. Hanselman, of Hollifield's unit, likewise testified that the goggles were rejected for lack of the spare lenses (R. 577).

On October 13, 1950, the date for filing bids on the E-1 kits, Buchsbaum went to Hollifield's office with his bid and asked prior examination of a sample war surplus goggle he had been furnished by petitioner, pointing out that he was having difficulty obtaining new goggles of this type (R. 149-150). With Hollifield at the time were others of the Wright Field organization, i.e., Hanselman, Murray, and Barker. Buchsbaum gave the following description of what ensued (R. 150-152):

> Mr. Bob Hollifield picked up the goggles and said: "I have seen these goggles before. They are no good." He said: "I rejected them yesterday * * *. They have a component part missing, that is, the extra lenses. The goggles

[5] Ski-goggles, required for the E-1 kits, are not to be confused with sun-goggles, required for the D-1 kits discussed *infra*.

require a pair of extra lenses, according to the specification." And Mr. Hanselman, who was right there, with me, knew as well as I know that the extra lenses were there.

Q. Where were these extra lenses? Describe these goggles to the Court and jury. Were they in a case or not?

A. The goggles were in a case; they are folded in two and they are compactly put into a sort of semi-circular case with a snap fastening a little flap that goes over the case.

* * * * *

Mr. Hollifield said he didn't know they were there. "This makes it different," he says, "Just a minute." And with that, to my recollection, he and Mr. Hanselman and Barker, I am not sure about Murray, they went in the next room across the hall, while I waited and they were comparing them with a similar pair of glasses that they had across the hall, which was a component part. Then about, I would say, ten minutes later they came back and Mr. Hollifield said: "I will approve these glasses, but * * * I will have to call [Cappel-MacDonald] and tell them that I am approving these. It is unfair if I don't."

Hanselman denied that he knew of the spare lenses until Buchsbaum showed where they were in the case (R. 578-579). Hollifield, according to Buchsbaum, put a call through to Cappel-MacDon-

ald, but Buchsbaum did not hear the conversation (R. 152). Buchsbaum thereupon affixed a rider to his bid providing for purchase of 14,200 of the goggles at $1.40 apiece (R. 130, 132, 152-153, RE 117).

Cappel-MacDonald's bid, filed on October 13, 1950, disclosed a striking out of the name of a Massachusetts concern as supplier of the goggles at $5 per item, and insertion of petitioner's name, at $1.40 per item (RE 89-90). Cappel testified that this was done just before filing, pursuant to phone approval by Hollifield (R. 608-609).

The contract was awarded to Cappel-MacDonald. The formal request for approval of use of the goggles, and the formal approvals themselves, followed at later times, Hollifield preparing the recommendation for approval dated November 22, 1950. Petitioner duly received payment of $19,880 for the goggles (R. 646, RE 29-36, 39-48, 81-92, 94, 107, 118-119).

Petitioner compensated Buchsbaum for obtaining approval of the goggles, by $4,000 in discounts on other purchases of the Buchsbaum company (R. 166).

Cappel testified that he met petitioner in Cappel's office in Dayton within "a matter of days" after October 13, 1950 (R. 612), and his employee, Marijane Morrissey, testified that she likewise met petitioner in Dayton shortly after October 13 (R. 190). However, Buchsbaum testified that in a conversation after October 19, 1950, petitioner inquired as to how one would go about going to Wright Field,

whom one should see as to what might be needed in other war surplus, and—when Buchsbaum suggested Hollifield—how one would get in touch with him. Buchsbaum replied, "The easiest way to do, when you get there, ask Mr. Hollifield how to get there. You have to get a bus. Ask him where to get the bus. I don't remember the building number" (R. 161-162, 167).[6]

Later, Buchsbaum made bids with respect to the D-1 kits which included sun goggles rather than ski goggles of the E-1 kits, and on January 8, 1951, he submitted samples of petitioner's war surplus goggles in this connection, since these had been made under specifications other than those designated in the contracts (R. 138-140, 163, RE 73-75). After testing the goggles, the Aero Medical Laboratory, on January 23, 1951, recommended rejection of the goggles because of "marked deviations" from specifications (R. 374-377, RE 80). Thereupon, on or before January 25, 1951, Hollifield phoned Moss, the project engineer who had prepared the rejection sheet, and asked to talk about the matter and bring someone with him. The additional person was petitioner, and the resulting meeting included, *inter alia*, one Murray, who was the project engineer on the D-1 kit (Hollifield was project engineer on the E-1 kit, and was also Mur-

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[6] Buchsbaum stated the time to be after his delivery of bids on both E-1 and D-1 kits (R. 160), the bid on the latter having been delivered to the Air Force on October 19, 1950 (R. 134). At another point in the testimony, the date was narrowed to "approximately October 20" (R. 167).

ray's unit chief) (R. 377-378, 387-388). In the hour-long discussion, Hollifield "practically exclusively" urged the acceptance of the goggles, Murray taking little part (R. 399). It was concluded that Hollifield should prepare a written memorandum of his reasoning (R. 378). The memorandum which followed, dated January 25, 1951, bore the typed initials of Hollifield as the person preparing the memo, but did not bear his signature at the point where one preparing a memo would usually sign, the only signature at that point being that of his subordinate, Murray (RE 81).[7] The reasons adduced in the memo were those employed by Hollifield at the conference (R. 379, RE 81). On the basis of this memo, petitioner's goggles were approved, under date of February 3, 1951 (R. 380-382), and authorized for use in contracts under which Buchsbaum was to supply some $56,700 worth of goggles (RE 76).[8]

The records of the telephone company disclosed a long distance call on April 13, 1951 from Hollifield's residence in Dayton, Ohio, to petitioner in Chicago (R. 415-416, RE 109, 111). A Chicago bank teller identified a $1,000 check of petitioner, dated the same day, and made out to "Cash" (R.

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[7] Further disclosure that Hollifield was the person who actually prepared the memo was adduced in that the language at one point slipped into an erroneous reference to the E-1 kit, which was Hollifield's own project, rather than the D-1 kit (RE 81).

[8] Purchase orders for 8,500 and 5,000 kits respectively (R. 96-98), with 3 pairs of goggles per kit (RE 61, 63), at $1.40 per pair (RE 117).

426, RE 103). Airline records disclosed tickets in Hollifield's name, that were used for flights from Dayton to Chicago on the morning of April 14, 1951, and return to Dayton that evening (R. 421-422, RE 112-113). The bank teller further testified that, on April 16, 1951, petitioner cashed the April 13 check (R. 425-428).

Petitioner was first questioned by the F.B.I. at the office of the F.B.I. on October 10, 1951 (R. 318). He was cautioned that he was not compelled to speak but that anything he might say might be used against him (R. 319, 349). In this and further interviews on October 12th, 16th, and 29th, he stated that approximately two years before (1949) he had left his name at Wright Field as a source of compasses, that he had received inquiries from Buchsbaum and Cappel-MacDonald which led to the dealings in goggles, that these firms handled "the question of the specifications," that eventually he received orders for the goggles, that he met Hollifield for the first time at the Cappel-MacDonald office in October 1950, and had met him on approximately fifteen occasions thereafter at Wright Field and in Chicago; that his first contact in Chicago with Hollifield had been at Buchsbaum's where he was trying to expedite some purchases; and that on that evening he (petitioner) and Hollifield and their wives went out socially (R. 320-323, 339-341, 346-347).

When petitioner was asked, in the first interview, about any money transactions with Hollifield, he stated that he wished to consult an attor-

ney before any further discussion (R. 321, 347). In the second interview, two days later, and in the third interview, petitioner stated the following to the F.B.I.:

After the social evening, he next met Hollifield on a Saturday, April 14, 1951, when Hollifield came to his office, pursuant to an earlier phone call, and pleaded financial distress because of the mortgage on his home, and asked help to the extent of $1,200. Petitioner obtained $1,000 in currency at his home and gave it to Hollifield in the washroom of a restaurant (petitioner's wife and Hollifield's daughter being at the restaurant), and he later replenished the currency at home with the proceeds of the April 13 check cashed on Monday, the 16th. (R. 323, 332-333).[9] Petitioner stated that the transaction was a loan, but he had no personal knowledge whether Hollifield had a home, and he had no security for the loan, nor any receipt or record of it. There was no agreement as to interest and Hollifield was to have "up to about two years" to make repayment. No repayments were ever made. Petitioner stated that he once asked for a payment but received none (R. 323-324). Two weeks after the loan, petitioner handed Hollifield an additional $200 in a car en route Wright Field from Dayton (R. 324).

In the interview of October 16, petitioner

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[9] Petitioner's bank statement, in the printed record, for the period February 28 to June 28, 1951, discloses numerous checks of $1,000 or more but does not show these, like the instant check, to have been for cash (RE 104-106).

brought to the F.B.I. office a prepared written statement of his recollection of the transactions, substantially repeating most of the oral account and adducing charity as the motive rather than compensation for service (R. 325).[10] Petitioner

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[10] The written statement is as follows (RE 101-102):

"I have been asked to submit a statement relating to my so-called dealings with Robert Holafield [sic].

"In the winter of 1950, as best I can recall, I was at Dayton, Ohio then visiting with the firm of Cappel & MacDonald & Company with whom I had numerous business transactions. At the office of this firm I met Mr. Holafield and in a discussion about things made for the armed forces, Mr. Holafield then stated that the next time I was in Dayton to visit him at Wright Field. Sometime later I went to Wright Field and saw Mr. Holafield and had a social visit with him. We discussed no particular matters of any kind. Sometime later when I visited Mr. Holafield at Wright Field I discussed with him the possibility of making a wrist compass that was being required by the armed forces as well as using my ¾ inch compass in any future kit. While there I saw photographs of numerous items being used and some of the items seen by me I recognized as items that I furnished to prime-contractors.

"Sometime in the spring of 1951 I learned about an objection to a goggle and decided while in Dayton, Ohio visiting Cappel & MacDonald & Company to discuss the matter with Mr. Holafield. At that time Mr. Holafield stated that he did not know what objection was being made and that if I care to know specifically what that objection was to talk with someone in the optical department. Mr. Holafield and myself then went to the optical department and I tried to learn what specific objection was being made and was informed that there was some slight difference in the lense specification.

"I wish to be understood that at no time had I requested Mr. Holafield to do anything on my behalf. I was making no sale to the government as my sales were at all times confined to prime-contractors, who I understand obtain approvals.

"Sometime in the early part of 1951 Mr. Holafield had

also brought to the F.B.I. certain bank statements and a check. The F.B.I. agent requested more detail and petitioner stated that he felt that the letter was sufficient and that "he did not want to put any further information in writing" (R. 331-332, 336, 344-345). In the interview of October 29, petitioner furnished invoices of his sales transactions, but when the discussion again reached a request for a detailed written statement concerning the delivery of the $1,200, petitioner stated that he desired first to consult his attorney; on November 1st he phoned, refusing the statement upon advice of his attorney (R. 349-350).

The trial court also admitted evidence of statements by Hollifield to F.B.I. investigators, testimony of Hollifield before the Grand Jury, and sworn written statements by him. The trial judge and counsel devoted repeated and extensive attention to the matter of keeping the jury alert to the necessity of considering the admissions of each

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been in Chicago and our respective families visited socially. Sometime in April, as best I can recall, Mr. Holafield communicated with me and indicated that he was hard pressed financially and although I felt no moral or legal obligation to Mr. Holafield in any manner I indicated to him that if I could help him I would try to do so. When he visited Chicago he called upon me and stated that the reason for his financial distress was that he had to meet a mortgage on his home of approximately $1,200.00. Being mindful of the fact that I could help him financially and being charitable I gave Mr. Holafield $1,000.00 which he promised to repay when he was financially able to do so and a few weeks later gave him $200.00. I realize now the foolishness of my act but had no motive in so doing except in making him a loan."

defendant only against the particular defendant who made the admissions (R. 260-261, 268-269, 290, 319-320, 331, 444, 503-504, 667-668).[11]

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[11] See the judge's language at the outset of the testimony concerning Hollifield's admissions (R. 260-261):

"Stop right there. Now, Members of the Jury, I want to instruct you at this time, I can't make my instructions too forceful. It is very important that you keep in mind what I am about to tell you. Perhaps it is rather difficult to be able to do so, but it is one of the duties that you will have to perform to the very best of your ability. In any statement that Mr. Hollifield, the defendant Hollifield may have made to this witness or any other witness, if we reach that stage wherein he mentions Mr. Opper, defendant Opper, you must not, in the absence of Mr. Opper, that is, this office where Mr. Opper was not present,—And he wasn't present, was he?

"The Witness: No, sir.

"The Court: When Mr. Hollifield, defendant Hollifield makes any statement by way of admission or confession, or whatever you please to call it, as to himself Hollifield, you may consider all of that testimony along with all the other testimony in the case in arriving at your ultimate conclusion and verdict, but you must not consider as evidence in this case as against the defendant Opper anything that may have been said by the defendant Hollifield in Mr. Opper's absence. This testimony is the statement by way of admission or confession, whatever you please to call it of Mr. Hollifield and it applies to Mr. Hollifield alone and exclusively, to nobody else.

"So, if in the course of this testimony, the name of Mr. Opper, defendant Opper is mentioned, you may not consider that and must not consider that as any testimony whatsoever as against the defendant Opper. You may consider it for whatever you think it may be worth as to its weight and so forth as against the defendant Hollifield.

"Nobody has the right to confess, if you call it a confession, for somebody else. It is all right to talk about themselves, but they cannot make some admission about somebody else who isn't present, at any event, and Mr. Opper was not present on this occasion.

"Now, please remember that. It is very important in this case. That principle must not be lost sight of and I instruct

In addition to these admonitions, the court in its final instructions charged the jury (R. 721-722):

> In this connection, however, I desire to call your attention to the following: There has been introduced in evidence through various witnesses, statements that were made on various occasions; some by the defendant Hollifield and some by the defendant Opper. There is in evidence the oral testimony of certain witnesses as to what these statements were. In addition to this oral testimony there are now in evidence three documents marked Government's Exhibits 37, 38 and 41.
>
> Exhibits 37 and 38 are written statements, signed by the defendant Hollifield. Exhibit 41 is a written statement signed by the defendant Opper.
>
> I have heretofore instructed you during the progress of the trial, as forcibly as I know how, but I repeat here that anything that defendant Hollifield may have said or written about himself in connection with the transactions here under consideration in the va-

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you now and I will instruct you later on, if we reach that stage in the trial, but right now I tell you in advance so there cannot be any question, what the Court is trying to impress upon you as forcibly as I can, because that is the law, and the defendant Opper is entitled to the benefit of that law, it is a shield thrown around him in this case, that he is entitled to and it must not be taken away from him. Anything that the witness testifies to that Mr. Hollifield said about himself you can consider along with the other testimony in the case and give it such weight as you deem it properly deserves.

"Now, with that understanding, you may proceed."

> rious counts of the indictment, you may consider as evidence against the defendant Hollifield, but you must not consider such statements as evidence against the defendant Opper.

Petitioner and Hollifield were found guilty on all counts (Pet. 8). Petitioner was sentenced to consecutive terms of imprisonment of two years on count 1 and one year on count 4; to fines of $500 each on counts 2 and 3; and to a term of imprisonment of one year and one day on count five, this sentence to run concurrently with the sentences imposed on counts 1 and 4. (R. 20, 29.)

On appeal, the Court of Appeals affirmed the judgment of conviction on counts 1, 4 and 5 and reversed on counts 2 and 3 on the ground that there was no competent evidence against petitioner to establish the specific payments charged in the reversed counts (R. 765, 772).

SUMMARY OF ARGUMENT

I

It is the petitioner's position that admissions by a defendant after the commission of an offense are to be subjected to corroboration in the same manner as confessions. It is the government's position that only when a statement consists of a conscious admission of guilt does it contain the infirmities of a confession which have led to the imposition of the requirement of corroboration. In the case of a denial of guilt, such as is here

involved, the basis for requiring corroboration of confessions is entirely absent.

This Court has stated in *Warszower* v. *United States*, 312 U. S. 342, that the purpose of requiring corroboration of confessions is simply to guard against convictions based on untrue confessions. The same need exists whether the confession is untrue because it has been extorted by improper pressures or because it is derived from a psychopathic aberration. While many confessions are, of course, completely voluntary and sane, the very circumstance of an individual's inviting punishment by accusing himself is a sufficient departure from normal conduct to give rise to doubts, which most courts require to be settled by corroboration of the confession. But an outright denial of guilt, with an exposition of the story which the accused would like to have believed, is a perfectly normal human reaction. There is not present in the statement the inherent contradiction which requires it to be tested more thoroughly than any other statement. The truth of the facts admitted should be for the jury.

In accordance with this analysis, the courts have generally drawn a sharp distinction between denials of guilt and confessions or admissions of guilt. This Court has itself recognized the distinction long ago in *Wilson* v. *United States*, 162 U. S. 613, and as recently as last term in *Stein* v. *New York*, 346 U. S. 156. And, by and large, the other federal courts and the state courts have also drawn the same line.

Petitioner's argument is largely based upon a dictum in *Warszower* v. *United States*, 312 U. S. 342, at 347, which when read by itself could be taken as indicating that this Court was equating all admissions after the crime to confessions. However, the particular form of that dictum was obviously derived from the facts in the particular case, where the statements in question actually preceded the commission of the offense and therefore could not constitute an admission of guilt. The meaning which petitioner would attach to the statement does not take into account the later expression of the Court in *Stein* v. *New York*, 346 U.S 156, and should not be adopted here. Petitioner also seeks for comfort in certain cases where there was indication that the statements had been extorted from a prisoner, in which case the test of admissibility was similar to that for extorted confessions. We would not argue that any involuntary statement drawn from an accused by illegal police methods should form the basis for his conviction. But the fact that where there is a basis to suspect compulsion the circumstances should be explored, does not mean that where there is every indication that a statement was carefully and voluntarily made it should be subjected to an artificial rule for admissibility.

II

Assuming, for the sake of the argument, the requirement of corroboration of the exculpatory statements of the petitioner, the next question is

whether his admissions were sufficiently corroborated to justify letting the case go to the jury.

It is well established that the corroboratory evidence need not be of such degree as by itself to establish the guilt of the accused. This is clearly stated in both *Daeche* v. *United States*, 250 Fed. 566 (C. A. 2) and *Forte* v. *United States*, 94 F. 2d 236 (C. A. D. C.), which are said to exemplify the two most commonly accepted applications of the corroboration rule. There is general accord on this aspect of the rule.

Petitioner's brief analyzes the issue between *Daeche* and *Forte*, as the extent to which the various elements of the *corpus delicti* must be touched upon by the corroboratory evidence. *Daeche* holds that, if the evidence supports the confession with respect to any of the elements of the *corpus delicti*, that is sufficient; *Forte* requires that the corroboration must extend to every element of the crime alleged. Where a complete confession is involved, this makes a very substantial difference in the quantity of outside evidence that must be introduced since under the *Daeche* rule the confession may be relied upon for proof of all the elements of the crime provided it is corroborated with respect to any element essential to prove the crime. Under the *Forte* rule, all elements of the offense must be corroborated so that the confession may not be relied upon alone to prove any of them.

Application of these requirements to the admission of a single damaging fact, as distinguished

from a complete confession, is technically difficult. However, *Daeche* stands for the proposition that the corroboration need not deal directly with the fact admitted, but need only support the charge that a crime has been committed by supporting the proof of an essential element of the crime. As applied to this case, where the two elements of the substantive offense are the payment of the money and the performance of the services, the admission of course deals with the payment, while the corroboration would be sufficient if it supports the accusation that the services were rendered. This interpretation of the rule appears to meet the underlying reason for requiring corroboration which, as expressed in *Warszower*, is to protect the "administration of the criminal law against errors in convictions based upon untrue confessions alone", without imposing more stringent restrictions on the admission of evidence or the functions of the jury than are necessary. Under this interpretation of the rule, there was ample corroboration in this case. Actually, nearly the entire record, outside of the admissions, supports the assertions of the indictment that the services were rendered. Certainly, petitioner does not object that there was insufficient evidence on this issue to go to the jury.

On the basis of the *Forte* interpretation, not only would the corroboration have to support the performance of (or the agreement to perform) services, but it would also have to touch upon the payment of (or agreement to pay) the money.

While it would seem to go far beyond the necessities of the rule to require corroboration of this element also, in the instant case there was ample evidence, in addition to the admission, of the payment as well as the services. The most direct corroboration consisted of evidence of: (a) the opportunity—Hollifield made a long distance call from his home to petitioner on April 13 and made a one-day round trip to Chicago on April 14 (the place and date of the admitted payment); (b) The means—petitioner drew a check for $1,000 payable to cash on April 13 (the day of the telephone call) which he cashed on April 16 (to replenish money he had taken from his house); (c) The motive—there was ample evidence of the relationship between the parties and of Hollifield's successful efforts to get petitioner's product accepted. More indirectly corroborative is the entire body of evidence showing another payment by petitioner to another businessman to get his products accepted, and the apparent attempt of both parties to conceal their activities. While the evidence was circumstantial, there can be no doubt that it was substantially corroborative.

III

The whole impact of the third point of petitioner's brief is an attack upon the use of the conspiracy count in criminal indictments and the desirability of adopting a stringent rule for the corroboration of admissions as a means of combating the evil. But the conspiracy argument has

nothing to do with this case. None of the statements of Hollifield or of the petitioner was offered or admitted against the other, so that there was no use of the conspiracy count to introduce evidence against a co-conspirator. If petitioner had a complaint about confusion in the minds of the jury, it must arise from the fact the defendants were jointly tried for their joint offense, the substantive counts as well as that for conspiracy. This is customary in this type of case. See e.g., *Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Manton*, 107 F. 2d 834 (C. A. 2), certiorari denied, 309 U. S. 664.

While there is inherently the danger of confusion in any joint trial, it is best met by careful instructions. Here, there were the most meticulous directions to the jury, both during the trial and at its conclusion. The court below corrected what it considered an error by the jury in convicting on two counts without sufficient evidence. Since there was ample evidence to support the conviction on the remaining counts without reliance on the confessions of the petitioner's co-defendant, it is pure speculation to assert that the jury acted improperly. Nor is there reason to believe from its opinion that the court below placed any reliance on Hollifield's confessions in affirming the conviction of the petitioner.

ARGUMENT

I

Petitioner's Admissions Did Not Require Corroboration Since They Were Part of a Denial of Guilt Rather Than a Confession of Guilt

The principal statement by the petitioner which is here in question constituted in its entirety a carefully considered, written, detailed, and specific denial of guilt. In part, petitioner stated (RE 102):

> I wish to be understood that at no time had I requested Mr. Holafield to do anything on my behalf. I was making no sale to the government as my sales were at all times confined to prime-contractors, who I understand obtain approvals.
>
> Sometime in the early part of 1951 Mr. Holafield had been in Chicago and our respective families visited socially. Sometime in April, as best I can recall, Mr. Holafield communicated with me and indicated that he was hard pressed financially and although I felt no moral or legal obligation to Mr. Holafield in any manner I indicated to him that if I could help him I would try to do so. When he visited Chicago he called upon me and stated that the reason for his financial distress was that he had to meet a mortgage on his home of approximately $1,200.00. Being mindful of the fact that I could help him financially and being charitable I gave Mr. Holafield $1,000.00

> which he promised to repay when he was financially able to do so and a few weeks later gave him $200.00. I realize now the foolishness of my act but had no motive in so doing except in making him a loan.[12]

This statement is obviously at the opposite pole from a confession or admission of guilt.

The direct holding of this Court in *Warszower* v. *United States*, 312 U.S. 342, makes it perfectly clear that the requirement for the corroboration of confessions does not apply to admissions made prior to the commission of a crime. Petitioner distinguishes, again on the basis of *Warszower*, between admissions before and after the fact and claims that as to the latter the corroboration rule applies (Pet. Br. 11-13). The language of the *Warszower* opinion (*infra*, p. 32) lends some apparent support to this position, but it is our purpose to demonstrate that it was not intended to apply to an admission such as is here involved, but only to a conscious admission of guilt. The fact that an admission precedes the crime is important because it makes it impossible that it could include an admission of guilt, but the fact that an admission follows a crime by no means demonstrates that it is consciously inculpatory.

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[12] In oral statements, the petitioner is stated to have fixed the time as April 14, 1951, the place as the washroom of a restaurant in Chicago, and the means as $1,000 in currency taken from funds at his home which he later replenished with a check drawn to cash on April 13 and cashed on April 16.

To avoid confusion, it may be well at the very beginning to distinguish the case before the Court from the situation where an admission is made by an accused person under circumstances giving rise to the suspicion that illegal pressures have been applied. Petitioner cites certain cases (*Wilson* v. *United States*, 162 U.S. 613; *Bram* v. *United States*, 168 U.S. 532) which indicate that admissions made under such circumstances are subject to the closest scrutiny before they may be admitted in evidence (Pet. Br. 14). Generally, the same precautions are adopted as are followed for confessions given in like circumstances.[13] But it proves too much to assume from this that in other respects and under other circumstances admissions and confessions should be treated the same. Any statement drawn from a speaker by force, whether it be confession, admission, or other testimony, is more apt to reflect the views of the torturer than the tortured. In the present case, the circumstances under which the statements were made give no indication whatever of compulsion. On the contrary, here is the case of a fully responsible business man, specifically guided by counsel, giving a careful exonerative statement to investigators in advance of any charges being made against him, much less any imprisonment, and then reducing such of those

[13] See, e.g., *Ziang Sung Wan* v. *United States*, 266 U. S. 1, 15, where four admissions and a confession given after seven days of interrogation were all treated as involuntary and found improperly admitted in evidence.

statements to writing as he and his counsel felt were to his advantage while refusing to confirm in writing certain other of his oral statements. Any analogy between the present case and the admissibility of admissions given in circumstances suggesting the possibility of improper inducement is inapposite.

Thus narrowed, the question before this Court is whether admissions included in unequivocal denials of guilt, made under circumstances completely devoid of indication or implication of coercion or improper inducement, carry in themselves the germ of untrustworthiness found in confessions, so that the same rule of corroboration must be applied to them before they may be submitted to the jury for its appraisal.

A. *The Basis for Requiring Corroboration of Confessions is Inapplicable to Denials of Guilt*

In its order allowing certiorari in this case (R. 775, 347 U.S. 1010), as in its opinion in *Warszower* v. *United States*, 312 U.S. 342,[14] this Court has recognized the existence of the rule followed in

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[14] A second statement in *Warszower* seems to limit the requirement of corroboration to such exceptional cases as perjury. The Court's language (312 U.S. at 347-348) is: "An uncorroborated confession or evidence of perjury, given by one witness only [citing *Phair* v. *United States*, 60 F. 2d 953 (C.A. 3); cf. *United States* v. *Harris*, 311 U.S. 292; both perjury cases], does not as a matter of law establish beyond a reasonable doubt the commission of a crime, but these are exceptions to the normal requirement that disputed questions of fact are to be submitted to the jury under appropriate instructions."

many jurisdictions that a defendant may not be convicted upon the basis of his confessions alone and that corroboration of the confession must relate to the *corpus delicti* of the offense. It should be noted, however, that there is no direct holding of this Court that either confessions or admissions require corroboration. In fact, in several early cases dealing rather exhaustively with the subject of confessions the requirement of corroboration is entirely neglected. *Miles* v. *United States*, 103 U.S. 304; *Hopt* v. *Utah*, 110 U.S. 574; *Sparf and Hansen* v. *United States*, 156 U.S. 51.[15] This suggests that the rule is not one of such obvious soundness as to achieve such immediate and universal acceptance as to lend weight to its extension to related fields.

It is suggested, 7 Wigmore, *Evidence* (3d ed.) § 2071, that the wide acceptance of the rule in the United States is attributable to the suggested bases of the rule found in 1 Greenleaf, *Evidence* (15th ed.) § 217, as follows:

> In the United States, the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords

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[15] The rule has been explicitly rejected in Massachusetts (*Commonwealth* v. *Sanborn*, 116 Mass. 61; *Commonwealth* v. *Killion*, 194 Mass. 153) and Wisconsin (*Potman* v. *State*, 259 Wis. 234). In England, it appears to apply only to a few crimes. See 3 Russell, *Law of Crimes* (7th Eng., 1st Can. ed.) 2156; 9 Halsbury, *Laws of England* (2d ed.) 207,183. The American Law Institute's *Model Code of Evidence* contains no requirement that confessions be corroborated.

> with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law.

Greenleaf does not define "confession" in connection with his discussion.[16] However, since the various statements of the rule almost invariably use the word confession in explaining the circumstances in which it is applicable, the meaning intended in the use of the term is obviously important. In fact, it is stated in 7 Wigmore, *Evidence* (3d ed.) §2074(a): "Whether the accused's statement amounts to a confession, so as to require corroboration under the present rule, depends on the definition of a confession (*ante* §821)."

The general lay concept of a confession is, of course, totally remote from what is here involved. Petitioner did not "confess" but, instead, argued his innocence. More precise definitions restate the same conclusion. Thus, Wigmore defines a confession (3 *Op. Cit.* §821):

> A confession is *an acknowledgement in express words*, by the accused in a criminal case, *of the truth of the guilty fact charged or of some essential part of it.* * * *
>
> * * * * * *

[16] In an earlier section it is defined as "acknowledgments of guilt." 1 Greenleaf, *Op. Cit.* § 170.

(2) *Exculpatory statements,* denying guilt, cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed: [citing numerous authorities] * * *.

(3) An acknowledgement of a *subordinate fact, not directly involving guilt,* or, in other words, not essential to the crime charged, is not a confession * * *. Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions [citing numerous decisions.][17] [Italics those of the author].

More basic, however, than a mere matter of definition is the consideration of whether the fundamental reasons underlying the adoption of the rule of corroboration for confessions are applicable to admissions contained in denials of guilt.

Since there is no decision of this Court directly upholding the rule, it is not strange that no complete exposition of its basis can be found here.

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[17] See also Underhill, *Criminal Evidence* (4th ed., 1935) 507-511; 2 Wharton, *Criminal Evidence* (11th ed. 1935) 953-954, 959-960; 2 Chamberlayne, *Evidence* (1911), 1863.

Petitioner's citation of Wigmore as supporting his view that admissions are to be treated in the same way as confessions (Pet. Br. 15) indicates a disregard of all of Wigmore's definition but the first paragraph. The second paragraph particularly recognizes the type of statement involved in this particular case and excludes it, in Wigmore's analysis, from the necessity of corroboration.

However, some indication of this Court's understanding of the foundation of the rule may be found in its brief expression in *Warszower*, 312 U.S. 342, at 347:

> The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist.[18] Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact.

If this statement is to be taken literally, it automatically excludes the necessity of corroboration for partial confessions or admissions since other elements of the crime not admitted would have to be otherwise proved, so that it would be impossible to achieve convictions on the basis of the "confession alone."

Greenleaf's discussion (*supra*, pp. 29-30) and Wigmore's analysis indicate that they believe the basis of the rule is the initial distrust which courts have again and again expressed with respect to con-

[18] The Court here cites sections 2070-2071 of Wigmore, *Op. Cit.* These sections do not deal with the distinction between confessions and other statements, but the annotator in the 1953 supplement to the treatise suggests that the citation intended was § 821, p. 242, line 2, distinguishing exculpatory statements.

fessions. It is suggested that when tested for voluntariness and sanity they may become trustworthy evidence, but that they may not be accepted without some preliminary careful scrutiny. Several early decisions of this Court, dealing with confessions and admissions of guilt, express this conflicting attitude towards their acceptance as evidence. In *Hopt* v. *Utah*, 110 U. S. 574, the Court stated at 584:

> While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke in *Regina* v. *Bald*, 2 Den. Cr. Cas. 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B., 1 Leach, 263, "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers."
>
> Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the

party making it that can be given of the facts stated in such confession. 1 Greenleaf Ev. § 215; 1 Archbold Cr. Pl. 125; 1 Phillips' Ev. 533-34; Starkie Ev. 73.

But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law. * * *

See also *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55; *Wilson* v. *United States*, 162 U. S. 613, 621-623.

More explicitly, an outright confession, in which a person accuses himself and thereby lays himself open to punishment, results in the strange combination on a court's part of a preliminary conclusion of truth and an accompanying feeling that caution is required. The preliminary conclusion is that one would not indulge in a falsehood that can only lead to punishment. The caution is against the untested acceptance of a confession that can be so disastrous that from its very nature there arises

a possibility that compulsion, improper inducement, or mental abberation may have caused the strange act. The act of confessing thus intrinsically calls for an inquiry as to whether the actual facts and circumstances bear out the suspicion, or whether the confession is only the common instance of an accused person simply realizing that the jig is up and desiring to tell the truth and get the consequences over with.

A denial of guilt, on the other hand, has none of the contradictory elements which throw the shadow over the confession; it is the perfectly natural reaction both of the child caught near the cookie jar and the Sunday driver arrested for speeding. In the absence of self-accusation or of some other fact or circumstance disclosing or suggesting the presence of compulsion or improper inducement, there is no occasion for either a special test of the admissibility of an accused's statements or of corroboration once they are admitted. Obviously, the fact that a statement later turns out to be against the speaker's interest does not cast the same doubt upon it which would exist had he known of its adverse effect at the time he spoke. The test, therefore, should be whether the statement constituted a conscious admission of guilt.

B. *The Cases Support a Different Treatment for Denials of Guilt than for Confessions*

Petitioner asserts that cases decided by this Court support the treatment of admissions after

the fact on the same footing as confessions (Pet. Br. 14). We believe that this is not so. The most recent expression on the subject is in *Stein* v. *New York*, 346 U. S. 156. There, in a prosecution for murder a witness was permitted to testify that, when he was brought into a room at the police barracks where the defendant was present, the defendant pointed him out as the driver of the truck in which the murdered man was riding.[18a] In footnote 5 on page 162, the Court dealt with the question of whether this was a confession, as follows:

> The defense says that this constitutes a coerced confession—Stein having made the statement in police custody. It was not a confession of guilt but an admission of a specific fact. Although New York may impose the same requirements for admissibility on an admission as it does on a confession, see *People* v. *Reilly*, 181 App. Div. 522, 528, 169 N. Y. S. 119, 123, aff'd, 224 N. Y. 90, 120 N. E. 113, such utterances are not usually subject to the same restrictions on admissibility as are confessions. See 3 Wigmore on Evidence (3d ed.) § 821 (3). In the face of the weight of authority to the contrary, it cannot be said that any such requirement is imposed by the Fourteenth Amendment. Even if this admission were subject to the same reliability tests as confessions, there is no evidence that Stein was under

[18a] This was not the confession the admissibility of which was the principal issue in the case.

any coercion thirty hours after his confession of June 7.

In *Ballew v. United States*, 160 U. S. 187, it was urged that the trial judge had improperly rejected evidence sought to be introduced on behalf of the defendant on the ground that, the witness having testified as to a confession, all of the attendant conversation should be admitted. In rejecting that argument, the Court clearly distinguished between confessions and admissions on the very basis we now urge. The Court said at page 193:

> The ground upon which counsel for plaintiff in error rests his claim of admissibility is that when a confession is put in evidence by the prosecution, it is the right of the accused to demand that all of the conversation in which the alleged confession was made should be received. We are unable to reach the conclusion that Ballew's mere statement to a witness, that the pensioner had given his son the check, was a confession, or in the nature of a confession. It had no tendency to establish his guilt or to operate to his prejudice, and confessions are only admitted as being statements against the interest of the party by whom they are claimed to have been made.

Even stronger support for our analysis is found in *Miles v. United States*, 103 U. S. 304, where the Court actually rejected the requirement that there be corroboration of the admissions there involved.

The case involved a prosecution of bigamy under the laws of the Territory of Utah. Part of the evidence on which the defendant was convicted consisted of statements, made by the accused to his friends after both marriages, that he had married the first of the women involved. The trial judge refused the defense request to give the following instruction (10 Office of Sup. Ct., Transcripts of Records [1880] pp. 8636-8637, R. 98-99):

> The first marriage and its legality must be affirmatively proved by evidence beyond the mere declarations, confessions, admissions, or reputations of the defendant; and if the jury believe from the evidence that there is no proof that def't and Emily Spencer were ever married beyond the mere admissions, confessions or declarations of the defendant, then they will find the defendant not guilty.

The trial judge charged the jury that it should determine the accused's guilt upon the basis of "all the facts and circumstances proven in this case, and from the admissions of the defendant, *or from either*" (103 U. S. at 308; italics supplied). This Court stated, on the general question of the validity of the admissions (103 U. S. at 312):

> The declarations of the [accused] touching his marriage with Emily Spencer, admitted in evidence against him, appear to have been deliberately and repeatedly made, and under such circumstances as tended to show that

> they had reference to a formal marriage contract between him and her.
>
> We are of opinion that the District Court committed no error in admitting such declarations, or in its charge to the jury concerning them.[19]

In asserting that this Court has erased the line between confessions and admissions, petitioner relies specifically on *Wilson* v. *United States*, 162 U. S. 613, and *Bram* v. *United States*, 168 U.S. 532. Neither of these cases supports the proposition for which it is cited. In *Wilson*, the Court in fact rested its opinion in part upon the distinction between confessions of guilt and denials, stating at 624:

> His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. * * * These were matters which went to the weight or credibility of what he said of an incriminating

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[19] That the issue now before this Court was specifically urged in the *Miles* case is made clear by an examination of the accused's brief (11 Office of Sup. Ct., File Copies of Briefs, 1880, No. 592, pp. 11, 13-14) where it is stated: "The *corpus delicti* can never be proven by mere admission. The law of bigamy should be no exception to the rule * * *." Moreover, in the opinion subject to review, the Supreme Court of Utah had itself stated in *United States* v. *Miles*, 2 Utah 19 at 25:

> It is, however, strenuously contended that the declarations, confessions or admissions of the prisoner are not alone sufficient proof of the first marriage. If the surroundings of such admissions show them to have been deliberate, they would be sufficient to support a verdict of guilty. * * *

> character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as a matter of law.

While in *Bram* the admission in question was considered by the Court to include a guilty admission, at page 562:

> The fact, then, is, that the language of the accused, which was offered in evidence as a confession, was made use of by him as a reply to the statement of the detective that Bram's co-suspect had charged him with the crime, and, although the answer was in the form of a denial, it was doubtless offered as a confession because of an implication of guilt which it was conceived the words of the denial might be considered to mean.

Moreover, both *Wilson* and *Bram* deal with situations where statements were made by accused persons in custody under circumstances indicating great doubt as to voluntariness. As stated above, no one can doubt that if any statement is made under coercion it should not be admitted, whether it be confession, admission, or other type of testimony.

The Court of Appeals for the District of Columbia, which is a court certainly not ill-disposed toward the corroboration rule, has itself pointed

out the distinction between confessions and denials of guilt in *Ercoli* v. *United States*, 131 F. 2d 354, at 356:

> Both appellant and the Government rely upon the case of Forte v. United States to establish their conflicting contentions concerning the disputed testimony. In the Forte case we stated the applicable rule governing the reception in evidence of extrajudicial *confessions*. In the present case appellant's statements to the officers were admissions made by appellant as exculpatory statements, rather than confessions. He did not in those conversations acknowledge guilt of crime, any more than he did in his testimony at the trial. The rules governing the reception in evidence of such admissions are much less onerous than those concerning confessions. But it is not necessary to draw the fine line of demarcation between the two, in order to decide this case, because, as we shall show, even under the requirements of the rule concerning confessions, appellant's statements were properly received in evidence.

See also *Morton* v. *United States*, 147 F. 2d 28, 31 (C.A. D.C.); *Dimmick* v. *United States*, 116 Fed. 825, 831 (C.A. 9).

Petitioner brushes aside the state cases relied on by the court below as not controlling and as not considering "the present question whether admissions in the nature of exculpatory statements

but still admitting some essential part of the offense charged require corroboration" (Pet. Br. 16). It must be admitted that the cases are not controlling, but they seem to us persuasive. All of these cases, *State* v. *Gilman*, 51 Me. 206, 225; *State* v. *Cadotte*, 17 Mont. 315; *State* v. *Novak*, 109 Ia. 717; *People* v. *Kristy*, 111 Cal. App. 2d 695; *Brauer* v. *People*, 113 Col. 194; *People* v. *Porter*, 269 Mich. 284, are specifically concerned with the legal distinction to be drawn between denials of guilt and confessions, the very distinction which the Government urges here. The fact that the issue is discussed in connection with initial admissibility rather than corroboration hardly reduces their persuasiveness.[20]

To a large degree, the petitioner's case is bottomed on the short statement by this Court in *Warszower* v. *United States*, 312 U.S. 342 at 347, "they [admissions made before the crime was committed] contain none of the inherent weaknesses of confessions or admissions after the fact." This language can be taken as linking all admissions after the fact with confessions in considering the necessity of corroboration. The

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[20] Of the three Court of Appeals cases cited by petitioner in support of his position, *Pines* v. *United States*, 123 F. 2d 825 (C.A. 8), appears to be a partial confession, rather than a denial, while *Gulotta* v. *United States*, 113 F. 2d 683 (C.A. 8) involves admissions made prior to the crime and therefore loses significance in light of this Court's holding in *Warszower*. Only *Calderon* v. *United States*, 207 F. 2d 377 (C.A. 9), really supports petitioner and that is now pending before this Court on certiorari, No. 25, this Term.

language used was, of course, induced by the circumstance that the court was dealing with a statement made before the crime, which could not have been extorted by police officers trying to solve the crime nor based upon some unfounded guilt complex. It was therefore natural in that case to distinguish between statements before and statements after the crime. But that does not necessarily mean that the Court intended to decide that all after-the-crime statements have the same weakness as confessions. There was no occasion to consider outright denials of guilt as distinguished from admissions of guilt, for before the commission of the offense the statement could be neither consciously self-accusing or self-defending. Moreover, the language in *Warszower* should also be read in the light of the later decision of this Court in *Stein* v. *New York*, 346 U.S. 156 (*supra*, p. 36), where the distinction between confessions and admissions is clearly recognized.

Insofar as admissions by a defendant are to be distrusted, not because of some inherent incredibility or because of the suspicious circumstances under which they were made, but merely because they are the statements of an interested party and may spring from a concealed intent, the solution is not to expand the corroboration requirement, as heretofore applicable to confessions, to a new field. For even within its present boundaries, the rule, which is an unvarying exception "to the normal requirement that disputed questions of fact are to be submitted to the jury under appro-

priate instructions" (*Warszower* v. *United States*, *supra*, at 348), is debatable. As this Court said in *On Lee* v. *United States*, 343 U.S. 747 at 757:

> The trend of the law in recent years has been to turn away from rigid rules of incompetence, in favor of admitting testimony and allowing the trier of fact to judge the weight to be given it. As this Court has pointed out: "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction." *Funk* v. *United States*, 290 U.S. 371, 376.

We are not here pressing for the abandonment of the artificial corroboration rule as it applies to confessions, merely for its containment within its present bounds. If a trial judge is convinced that an admission cannot serve to convince a jury beyond a reasonable doubt and that there is not sufficient evidence outside the admission, it is his clear

duty to keep the case from the jury. In the case of an admission, the corroboration rule is not necessary in the only circumstances in which it might otherwise be considered necessary to prevent unfounded convictions.

II

If the Requirement of Corroboration Were Applicable to Petitioner's Statements, There Is Sufficient Corroborative Evidence Under Any of the Accepted Rules.

Assuming, solely for the sake of the argument, that the requirement of corroboration is applicable to the exculpatory explanations of petitioner, the question is then reached whether his admissions were sufficiently corroborated to justify the court in letting the case go to the jury or the jury in bringing in a conviction. Since it decided the case on the ground that corroboration was unnecessary, the court below did not reach this issue directly, although it did speak of the "framework" in which, and the "background" against which, the statements were made, implying an awareness that the admissions were supported by the entire record (R. 771). However, it is our contention that the record contains sufficient corroborative evidence to satisfy any of the currently accepted standards as to the degree of corroboration necessary.

A. *The courts have adopted different interpretations of the rule as to the extent of the required corroboration.*

In a field where the verbal distinctions drawn by the courts are as numerous as the courts involved,

and perhaps more so since some circuits are not even entirely consistent within themselves, it is a happy circumstance that there appears to be no dissent from the proposition that the corroborative evidence need not be sufficient in itself to establish the case. It suffices if such evidence, together with the confession, prove the government's case. The language of Judge Learned Hand in *Daeche* v. *United States*, 250 Fed. 566 (C.A. 2) at 571, is:

> * * * We start therefore, with the assumption that some corroboration is necessary, and the questions are to what extent must it go, and how shall the jury deal with it after it has been proved. The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. * * * But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither

> beyond a reasonable doubt nor by a preponderance of proof.

And in *Forte* v. *United States*, 94 F. 2d 236 (C.A. D.C.), it is stated at p. 240:

> * * * We do not rule that such corroborating evidence must, independent of the confession, establish the *corpus delicti* beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the *corpus delicti* and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith.

And these views have been restated by both of these courts, and by others which have passed upon the issue. *Ercoli* v. *United States*, 131 F. 2d 354 (C.A. D.C.); *George* v. *United States*, 125 F. 2d 559 (C.A. D.C.); *United States* v. *Kertess*, 139 F. 2d 923 (C.A. 2), certiorari denied, 321 U.S. 795; *United States* v. *Markman*, 193 F. 2d 574 (C.A. 2), certiorari denied *sub nom. Livolsi* v. *United States*, 343 U.S. 979; *Gregg* v. *United States*, 113 F. 2d 687 (C.A. 8); *Oldstein* v. *United States*, 99 F. 2d 305 (C.A. 10); *Jordan* v. *United States*, 60 F. 2d 4 (C.A. 4), certiorari denied, 287 U.S. 633.[21]

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[21] It follows, almost as a matter of course, that the evidence supporting the proof of the *corpus delicti* may be circumstantial and that there is no rule that there must be eye witnesses. *See St. Clair* v. *United States*, 154 U. S. 134, 152; *Perovich* v. *United States*, 205 U.S. 86, 91.

Where differences do crop up between the circuits is with respect to the extent of the subject matter which must be supported by the corroboration. While most courts agree that the corroboration must touch upon the *corpus delicti*,[22] there is a sharp divergence between the Second Circuit and the District of Columbia Circuit on whether all the essential elements of a crime must be touched upon, or whether it is sufficient for the outside evidence to support the proof of one of the essential elements. The *Forte* case in the District of Columbia stands for the former proposition and the position is stated even more clearly in *Ercoli* v. *United States*, 131 F. 2d 354 (C.A. D.C.) where the rule is restated at 356-357:

> Briefly stated the rule of the Forte case is that (1) there can be no conviction of an accused person in a criminal case upon an uncorroborated extra-judicial confession; (2) such corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence touching and tending to prove each of the main elements or constituent parts of the corpus delicti; (3) however, such corroborating evidence need not, independent of the confession, establish the corpus delicti beyond a reasonable doubt; (4) if there is substantial evidence of the corpus delicti, independent of the confession, and the two, together, are convincing beyond a reasonable

[22] Even as to this, there is some disagreement. See cases collected in 7 Wigmore, *Evidence* (3rd ed.) § 2071.

doubt of a defendant's guilt, that is sufficient. And the rule was clearly restated in George v. United States.

The *Daeche* case in the Second Circuit stands for the latter rule and the differences between the two circuits are made even more explicit in *United States* v. *Markman*, 193 F. 2d 574 (C.A. 2) at 576:

> * * * Whatever may be the rule elsewhere we have held that the extra-confessional proof required need not itself preponderantly establish the guilt of the defendant; if it shows by independent facts that the crime has been committed against which the jury can measure the reliability and consistency of a defendant's own statements, this is enough. The purpose of the rule requiring corroborative testimony is only to guard against convictions based upon an untrue confession. Warszower v. United States, supra, 312 U.S. at page 347, 61 S. Ct. 603. Its function is not so much to give evidence of the defendant's guilt as to supplement his confession to that effect.

B. *Under the less stringent interpretation, which we submit is the proper one, there is no real issue here on whether there was sufficient corroboration.*

When the interpretation adopted by the Second Circuit (in the *Daeche* case), in a situation involving a full confession, is applied to the admission of

a single damaging fact, certain technical difficulties appear, particularly if, as in *United States* v. *Calderon*, No. 25, this Term, the admitted fact is not part of the *corpus delicti*. However, *Daeche* appears to stand for the proposition that the corroboration need not deal directly with the fact admitted, but that it will be sufficient if it supports the accusation that a crime has been committed by providing evidence dealing with an essential element of the *corpus delicti*. In the present case the substantive offense charged includes two elements, first, the payment of money, and second, the performance of services. Petitioner's admissions deal only with the payment of the money. Under the *Daeche* interpretation, these admissions would be deemed sufficiently corroborated if outside evidence supports the proof of the other element of the offense, namely, that the services were rendered.

The Second Circuit's interpretation meets the underlying reason requiring corroboration which, as this Court stated in *Warszower* v. *United States*, 312 U.S. 342, at 347, is to protect "the administration of the criminal law against errors in convictions based upon untrue confessions alone." It is certainly desirable not to go beyond this by imposing any further restrictions on the admission of evidence, or on the functions of the jury in deciding contested issues of fact. The danger that no crime at all has been committed or that the accused's statements have been forced from him without any

basis in fact are protected against by the less stringent requirement of proving, not the entire crime, but an essential part thereof.

Under this interpretation of the rule, there is ample corroboration in this case. Actually, nearly the entire record, outside of the admissions, supports the assertions in the indictment that Hollifield exerted extraordinary efforts in order to obtain approval of petitioner's product for inclusion in the purchase order by the Air Force (see pp. 10-11, *supra*). Even if it is conceded that reasonable men could put different interpretations on the relationships between the petitioner and Hollifield and their various activities, not even petitioner now objects that there was insufficient evidence on this issue to go to the jury. The same evidence which was essential for the Government to make its case was sufficient to serve as corroboration for the admission, and if the sufficiency of that evidence is to be attacked, it should be done on the more basic proposition that the Government failed to prove it's case rather than upon the extension of a technical rule of evidence.

C. *Even under the more stringent interpretation there was sufficient corroboration in the record.*

On the basis of the *Forte* rule (*supra*, pp. 47, 48), not only would the corroboratory evidence have to support the performance of (or agreement to perform) services, but it would also have to touch

upon the payment of (or agreement to pay) the money. While such an interpretation seems to go far beyond the necessities of the rule, in the instant case there is actually ample evidence corroborating the admission of payment—as well as (as we have just shown) establishing the performance of the services.

As is pointed out above, the courts, without exception, agree that the corroborative evidence need not be sufficient by itself to establish the element of the crime covered by the admission. (*Supra*, pp. 45-47.) The District of Columbia Circuit says the evidence must be "substantial" (*Forte* v. *United States*, 94 F. 2d 236, at 240); the Second Circuit says it must "fortify" the admission (*Daeche* v. *United States*, 250 Fed. 566 at 571). What is substantial or what sufficiently fortifies is largely a matter of judgment delegated to the trial court, not unlike other questions of substantiality or sufficiency. But whichever test is used, the petitioner is taking liberties when he argues (Pet. Br. 26-27) that the substantiating evidence is not sufficient because it can be otherwise explained than on the theory of guilt. Cf. *Glasser* v. *United States*, 315 U. S. 60, 80; *Curley* v. *United States*, 160 F. 2d 229, 232-233 (C. A. D. C.), certiorari denied, 231 U.S. 837; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U. S. 664. In effect, if not in words, petitioner appears to be arguing for the rule that the *corpus delicti* must be established by an eye-witness, a proposition

which as Wigmore points out has never found acceptance in the United States. 7 Wigmore, *Evidence* (3d ed.) § 2081.

However, unless an eye-witness is required, there was ample evidence in the instant case corroborating the payment. As pointed out above (*supra*, pp. 12-15), the admission was petitioner's written statement that he gave Hollifield $1,000, amplified by his oral statements that the payment was made on April 14, 1951, in Chicago, from funds petitioner took from his home and replaced on April 16 by cashing a check. For purposes of convenience, the corroborative evidence may be classified under the headings of opportunity, means, and motive.

1. *The Opportunity.* Records of the telephone company prove that a long distance call was placed on April 13, 1951, from Hollifield's residence in Dayton, Ohio, to petitioner in Chicago (R. 415-416, RE 109, 111). Records from an airline show tickets were issued in Hollifield's name and were in fact used for a flight from Dayton to Chicago on the morning of April 14, 1951, and a return to Dayton that evening (R. 421-422, RE 112-113). This evidence certainly supports the statement in the admission that Hollifield pursuant to a telephone call came on to Chicago where the payment was made.

2. *The Means.* A Chicago bank teller identified a $1,000 check signed by petitioner, dated April 13, 1951 (the date of the telephone call), and made out to Cash (R. 426, RE 103). It was also testified that petitioner cashed that check on April 16, 1951 (R.

425-428). This certainly corroborates petitioner's statements as to the method of payment. Nor does it destroy the corroborative nature of this evidence to point out, as petitioner does (Pet. Br. 27), that he drew other checks in the same or larger figures. The bank statement indicating the clearing of these checks does not, moreover, give any indication that they were cashed by petitioner, or in fact, that they were drawn for cash (RE 104-106).

3. *The Motive.* The motive of course lies in the financial interest petitioner had in having his products accepted and the successful efforts of Hollifield to gain them acceptance in spite of the fact that they did not meet the original specifications.

And quite apart from the corroboration specifically discussed above, much of the other evidence introduced by the government indirectly supports the statement. Thus, the fact that in a prior transaction petitioner found it worth while to pay $4,000 to another business man who aided him in getting acceptance of another product by the Air Force indicated that, if he would pay in one case, he might well pay in another. The apparent attempt of the parties to conceal their relationship, and Hollifield's attempt to disassociate himself from the memorandum asking reconsideration of the glasses, support the theory that there was some sort of an agreement between the two. As Justice Sutherland stated in *United States* v. *Manton*, 107 F. 2d 834 at 848:

> * * * Certainly they are not the accompaniments of honest business. The circumstances

> of secrecy, intrigue and deviousness, and the attempts to conceal the real nature of the transactions, which the evidence discloses, are hallmarks of fraud and dishonesty, justifying the jury's conclusion that a criminal conspiracy existed * * *.

In the light of the entire body of the evidence, it is respectfully submitted that petitioner's statements concerning his payments to Hollifield were amply supported by other evidence. The admissions of the petitioner were extensively corroborated both by specific details such as the telephone call, the plane trip, and the check, and by persuasive general evidence of petitioner's previous method of dealing, of his financial motivation, of Hollifield's efforts in petitioner's interest, and of the pattern of concealment indicative of conscious guilt.

III

There Is No Basis for Reversal on the Ground That the Jury Relied on Confessions of the Petitioner's Co-defendant or That the Court Below Sustained the Conviction on That Evidence

At this point, we pass from the issue of the appropriate use to be made of the petitioner's admissions and come to an entirely separate issue, whether the confessions of the co-defendant, Hollifield, were improperly considered either by the jury or by the court below either in convicting, or affirming the conviction of, the petitioner. For the pur-

poses of this issue it may be assumed that the petitioner's own admissions were properly considered as evidence against him.

Before turning to the question itself, it may be well to dispose first of an issue actually entirely absent from this case which the petitioner seeks to drag in by the heels. As we read the third point of petitioner's brief, it appears to be an attack upon the use of the conspiracy count in criminal indictments for the purpose of making available against co-conspirators evidence which would otherwise be inadmissible against them. Somewhat illogically, the petitioner grafts upon this straw man the suggestion that such abuse can be combatted by a generous application of the rule requiring corroboration of confessions. (Pet. Br. 30-34.) But the conspiracy argument has nothing to do with this case. None of the confessions of Hollifield were admitted against petitioner, nor could they have been since they were made long after the conspiracy was completed. In fact, the confessions were quite as relevant to the substantive counts against Hollifield as they were to the conspiracy count, so that the government neither sought nor gained any advantage in this respect by including a count for conspiracy.[23]

[23] The advantage is not always with the government in a conspiracy count, as against the substantive offense. In a famous case, after Fall and Doheny had been acquitted on a conspiracy charge, Fall was convicted and the conviction upheld, on a second indictment which charged a substantive offense under the statute here involved. *Fall* v. *United States*, 49 F. 2d 586 (C. A. D. C.), certiorari denied, 283 U. S. 867.

If petitioner had had a justified complaint with respect to confusion in the mind of the jury, it would have arisen from the perils inherent in the joint trial of defendants who had chosen to associate themselves in the criminal enterprise. While there is a danger co-defendants will be tarred with the same brush, the alternative of separate trials has definite elements of unfairness to individual defendants, depending on the order in which they are tried, as well as being onerous on the courts. Generally speaking, trials involving crimes of the nature of that here involved have been conducted against the defendants jointly and the convictions upheld. See e.g., *Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Manton*, 107 F. 2d 834 (C. A. 2), certiorari denied, 309 U. S. 664. The question of whether trials should be joint or several should be committed to the discretion of the trial court. Protection against prejudice is to be achieved by careful instructions by the trial judge rather than by importing artificial rules as the admissibility of evidence which, even assuming their merits for the situations for which they were designed, have no relationship to the abuse here to be protected against.

Turning now to the question of whether the jury improperly convicted the petitioner on the basis of Hollifield's confessions, reference is again made to the clear, repeated, and forceful admonitions of the trial judge as to the limitations on the use of that evidence (see *supra*, pp. 15-18). These in-

structions came not only at the conclusion of the trial, but also at the time the evidence was admitted (*supra*, pp. 15-17). Since petitioner levels not one word of criticism at these instructions, it must be assumed that they were, and are, satisfactory to him.

It being impossible to divine what has transpired in the minds of the jurors, the only method of determining whether they followed instructions is to consider their actions as against the evidence before them. The evidence is reviewed above, *supra*, pp. 5-15. It is submitted that, without any aid from the confessions of Hollifield, there was ample evidence to sustain the conviction of the petitioner.[24] This being so, there is no possible basis for reversal on this ground.

Turning from the verdict of the jury to the action of the court below in sustaining that verdict, we have not only its actions on the basis of the record, but also its stated reasons for acting as it did. It is noteworthy that the court's careful review of the evidence contains not a single fact which is not sustainable by evidence in the record outside of the confessions of Hollifield (R. 767-768).[25] On the

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[24] Petitioner argues that the jury's error in convicting petitioner on counts two and three, which the court below reversed for insufficient evidence, indicates they considered Hollifield's confessions against petitioner (Pet. Br. 31). This does not follow since, although there was some confusion, Hollifield's clearest statements, and both his written statements, denied payments beyond $1,200, which would like petitioner's own admissions, support only counts one, four, and five (R. 262, 284-5; RE 98-100).

[25] Petitioner points out that the court below did rely on matters which were not independently proved *dehors* the petitioner's own admissions (Pet. Br. 31). This is not only tru

contrary, it recognized in its opinion that these statements were not binding upon the petitioner (R. 769, 772). Moreover, in reversing the conviction on counts two and three, the court below specifically referred to the fact that some evidence supporting them could be found in Hollifield's statement but points out it could not be considered against petitioner (R. 772). Thus, both in actions and in words the court below appears to have refrained from considering incompetent evidence against the petitioner.

In this Point, as indeed in Points I and II, petitioner appears to be attempting to shore up his case by attacking improper prosecution practices, assuming that this puts the government in the position of supporting such practices. When the issue is reduced by a consideration of the cold facts of the particular case, the "fruitful opportunity for prophylactic adjudication" (Pet. Br. 34) disappears and all that is left is an attempt to reverse a well-merited conviction on the basis of principles of law which have no application.

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but quite understandable in view of the court's holding that the admissions were properly before the jury. However, this is no basis for the argument that the court improperly considered Hollifield's confessions which it clearly recognized as not being binding on petitioner (R. 769).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

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